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Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

Colvin I. Bert
Petitioner

v.

Comptroller of the Treasury of Maryland
Respondent

On Petition for Writ of Certiorari
To Maryland Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Special Appeals of Maryland denied petitioner his due process rights pursuant to the Fifth, and Fourteenth Amendments of the United States Constitution, when they determined that his state income tax return was frivolous based on an unproven and unsubstantiated allegation of fraud.
2. Whether the Court of Special Appeals of Maryland correctly held, in acknowledged conflict with the Courts of Appeals for the Seventh and Ninth Circuits, that an individual state income tax return was frivolous purely based on a single line entry.
3. Whether the Court of Special Appeals of Maryland correctly held, in acknowledged conflict with the Courts of Appeals for the Seventh and Ninth Circuits, that a citizen who filed what is purported to be a valid return can be denied a refund on an allegation of fraud versus a factual finding of fraud.

PARTIES TO THE PROCEEDING

There are no additional parties to the proceedings other than those listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 14.1(b) and 29.6, there are no parties to this case that are a parent or publicly held company owning 10% or more of the corporation's stock.

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OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland (CSA) filed November 24, 2008 is unpublished [CSA No. 2131, Sept. Term, 2007] and reproduced at Apx. A1.

The unpublished order of the Maryland Circuit Court for Howard County (Circuit Court) entered September 25, 2007 [13-C-06-067541] is reproduced at Apx. A22.

The denial of cert. and denial of motion to reconsider by the Court of Appeals of Maryland (COA) is unpublished [No. 638, Sept. Term 2008] and reproduced at A24 and A25 respectively.

The November 8, 2006 decision of the MTC affirming the Notice of Final determination [MTC No. 06-IN-OO-0207] issued by Comptroller's Hearing Officer is reproduced at A26.

The MTC order [No. 06-IN-OO-0207] issued October 18, 2006 quashing Mr. Bert's writ of summons issued to Comptroller's Hearing Officer, Deborah Gorman is reproduced at A28.

Order [No. 06-IN-OO-0207] denying Mr. Bert's motion for summary judgment issued by the MTC on August 29, 2006 is reproduced at A29.

Comptroller's Hearing Officer's notice of final determination [Tracking No. 52667] dated April 11, 2006 reproduced at Apx. A30.

Finally, Comptroller employee assessment issued October 20, 2005 reproduced at A39.

STATEMENT OF JURISDICTION

The CSA judgment was filed on November 24, 2008 (Apx. A1). A timely petition for writ of certiorari filed with the COA was denied on April 10, 2009. Apx. A24. A timely motion for reconsideration of the denial of certiorari filed with the COA was denied on June 19, 2009 (Apx. A25). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATEMENT OF THE CASE

This is one of the most important due process cases ever to reach this Court. Resolution of the questions presented here will largely determine the due process rights a Maryland citizen has when faced with a contested state tax liability. In addition, resolution of the questions presented here will determine where the burden of proof lies when there is a contested state tax liability based on the issuance of a frivolous return penalty.

The Comptroller of the Treasury (Comptroller) for the state of Maryland utilizes the frivolous return penalty to assess Maryland residents additional tax liabilities, but at the same time deny the citizen his due process right to object to the assessment.

The Comptroller accomplishes this violation of a citizen's constitutional right by not following Title 26 U.S.C. § 6703, wherein it clearly states that the burden of proof is on the Secretary (i.e., the Comptroller) when a frivolous return penalty (i.e., 26 U.S.C. § 6702 or TG § 13-705) is assessed. In this case the CSA erroneously supports the Comptroller's

denial of Mr. Bert's constitutional rights by placing the burden on Mr. Bert and not the Comptroller.

The abuse of administrative procedures, denial of due process, and illegal acts by Maryland state tax collection employees in the instant case is similar to the abuse discovered by Congress in 1998.

The abuse in tax assessment and collection by state government employees has escalated over the past ten years and the state of Maryland is by no means innocent of denying a citizen his due process rights in an effort to forceably assess and collect tax revenues.

The CSA's decision to affirm an illegal and erroneous order of the MTC supports this abusive tax collection process and denies petitioner (Mr. Bert) and other Maryland citizens their 5th and 14th amendment due process rights.

It is in the public interest and in the greater good for the society as a whole for the Court to determine whether the Maryland appellate courts below are improperly interpreting tax statutes for the purpose of systematically denying a citizen his due process rights regarding any contested tax liability. Tax-General (TG) § 13-705 of the Maryland Annotated Code is the Comptroller's weapon of choice when there is a desire to invalidate an individual's submitted tax return for the purpose of assessing and collecting taxes without providing due process.

The Court should also review whether it was a denial of due process for the CSA to make an independent finding of fact to support their

judgment that it was legally proper to assess Mr. Bert a frivolous return penalty.

I. Factual Background

This case begins with Mr. Bert filing his 2003 Maryland income tax return requesting a refund of $5,256.42. A Comptroller employee (Rita Bormuth) in a notice dated October 20, 2005 (Apx. A39) corrected Mr. Bert's 2003 tax return and omitted all but $25.63 of his requested tax refund and assessed him an additional $500 penalty for filing an alleged frivolous return. The only explanation provided by the Comptroller employee was that Mr. Bert *"submitted a Maryland income tax return for 2003 and have indicated that wages are not income subject to taxation."* The letter from Rita Bormuth (Ms. Bormuth) also stated that Mr. Bert's return was adjusted to include income and the refund on the return was corrected. Mr. Bert filed a timely appeal of this alleged assessment.

Mr. Bert mailed a response to the Compliance Programs Section; Tax Investigation Unit dated November 18, 2005 requesting a hearing upon receipt of lawful tax assessment. Mr. Bert also indicated in his November 18th letter that he did not claim on his 2003 MD tax return that wages are not income subject to taxation. Mr. Bert also enclosed in his November 18th letter a Demand for Verified Evidence of Lawful Federal/State Assessment.

The Comptroller issued a Notice of Hearing dated 12/16/2005 scheduling a hearing for 2/22/2006. The Comptroller did not provide petitioner with evidence of a lawful state assessment. This is the beginning of the Comptroller denying Mr. Bert his

due process rights. A lawful state assessment containing a denial of refund pursuant to TG § 13-904 and an assessment assessing Mr. Bert a tax pursuant to TG § 13-401 were not provided as required.

II. Proceedings Below

A. Hearing Conducted by Comptroller's Hearing Officer

Mr. Bert presented fourteen (14) exhibits at the hearing held February 22, 2006 to support the entries on his Maryland tax return. Mr. Bert offered all of the above referenced documentation as evidence to be made part of the record pursuant to State Government Article (SG) § 10-213 (a) (1). In contrast, the Comptroller's alleged representative (Ms. Bormuth) offered no evidence to be made part of the record pursuant to SG § 10-213(a)(2).

At the hearing Mr. Bert testified that he prepared his Maryland income tax return, for 2003 pursuant to TG §§ 10-805, 10-203 and 10-501. Mr. Bert also testified that he entered on line one (1) of his Maryland tax return his adjusted gross income from his federal return. Neither Ms. Gorman nor Ms. Bormuth disputed the above referenced statutes utilized by Mr. Bert to complete his 2003 Maryland income tax return.

In addition, Ms. Gorman in her Notice of Final Determination (Apx. A30) states:

> Pursuant to Tax-General Article § 10-102, a tax is imposed on the Maryland taxable income of each individual. "Maryland taxable income" is defined at Tax-General Article §10-101 for an

> individual as "Maryland adjusted gross income, less the exemptions and deductions allowed under this Title." Tax General Article § 10-203 provides that "the Maryland adjusted gross income of an individual is the individual's federal adjusted gross income for the taxable year as adjusted under this Part II of this subtitle."

Subsequently, neither Ms. Bormuth nor Ms. Gorman disputed the federal adjusted gross income amount indicated on Mr. Bert's federal tax return.

In addition, Mr. Bert submitted as evidence at the hearing correspondence from the Internal Revenue Service (IRS) that did not dispute entries on his federal tax return. Mr. Bert submitted a letter to the IRS dated October 13, 2005 objecting to a proposed change to his 2003 federal tax liability. Attachment A of this October 13th letter was the letter from the IRS received by Mr. Bert. This letter makes no mention of changing Mr. Bert's federal adjusted gross income.

Mr. Bert also submitted a letter from the IRS dated November 21, 2005 acknowledging receipt of Mr. Bert's October 13th letter and indicated that he would be contacted if they decide to take any additional action in regards to his 2003 account. To date no action has been taken by the IRS and Mr. Bert also submitted as evidence a federal account transcript for tax year 2003 from the IRS dated November 18, 2005 indicating that Mr. Bert's federal return had been filed and was assessed $0.00.

Ms. Gorman acknowledges the above referenced letters to/from the IRS in her Notice of Final Determination (Final Determination) on pages A32 and A33. Ms. Gorman also states on page A33 that *"Short of any adjustment by the Internal Revenue Service, Mr. Bert asserts that the federal adjusted gross income reported on his Maryland return ($0.00) is correct."*

Ms. Gorman states in her Determination (on page A31) that

> Ms. Bormuth stated that she recomputed the return to include the wages reported by Data Computer Corporation in the amount of $77,779.00. Based on that income, Ms. Bormuth determined that the total Maryland and local tax due was $5,230.79, which after applying the withholding, left a refund of $25.63.

However, at the hearing Ms. Bormuth did not enter any evidence that supported her claim that Data Computer Corporation ("DCCA") reported wages of $77,779.00. Ms. Bormuth did not enter as evidence a certified Form W-2 from DCCA or any other certified document showing Mr. Bert had taxable wages of $77,779.00. In addition, Ms. Bormuth did not enter as evidence any documents showing that she recomputed Mr. Bert's return and that her computation was accurate. Nor did Ms. Bormuth issue to Mr. Bert a notice of final determination on his claim for refund pursuant to TG § 13-904 (2) (b) (1).

Finally, Ms. Bormuth did not enter any evidence or an assessment of tax pursuant to TG § 13-401 to support Ms. Gorman's statement in her Determination (on page A31) that "- *Ms. Bormuth determined that the total Maryland and local tax due was $5,230.79*-." In addition, Ms. Bormuth's October 20, 2005 assessment does not state that she assessed a tax pursuant to TG § 13-401 nor does she state that she denied Mr. Bert's claim for refund pursuant to TG § 13-904. Ms. Bormuth's October 20th notice only states that she assessed a frivolous return penalty pursuant to TG § 13-705 and indicates there was a corrected refund of $25.63.

The denial of Mr. Bert's due process rights continues at the TG § 13-508 hearing. The Comptroller does not provide Mr. Bert with any opportunity to dispute any evidence that justifies Ms. Bormuth's changing of his adjusted gross income on his return because no evidence was presented.

Ms. Gorman completes the informal hearing held February 22nd and issues her notice of final determination on April 11, 2006.

Mr. Bert timely filed an appeal of Ms. Gorman's April 11th determination with the MTC.

B. Proceedings in MTC

Mr. Bert filed a motion with the MTC for a summary judgment against the Comptroller when the Comptroller did not respond to Mr. Bert's petition in accordance with the MTC rules. Without explanation the MTC denied Mr. Bert's motion for summary judgment.

Mr. Bert also filed motions for writ of summons to Ms. Bormuth, Ms. Gorman and Ronald

D. LaMartina (Comptroller employee responsible for responding to freedom of information requests). The MTC granted all three summonses. However, the Comptroller filed a motion to quash the writ of summons for Ms. Gorman; claiming Ms. Gorman acted in a psuedo-judicial position when she held the Comptroller's informal hearing and was not subject to a writ of summons. Mr. Bert responded to the Comptroller's motion; however, the MTC granted the Comptroller's motion to quash.

The MTC held a *de novo* hearing on October 18, 2006, (Case # 06-IN-OO-0207). In that case the issues before the MTC were as follows:

a. Did the petitioner, Colvin I. Bert, submit a valid and correct Maryland income tax return for 2003 supported by evidence and testimony on the administrative record?

b. Did hearing Officer Debora Gorman issue an erroneous Notice of Final Determination that was not supported by evidence and testimony in the administrative record?

c. A question of Law concerning TG § 10-804. Did Mr. Bert file a valid return?

d. Did Rita Bormuth assess a frivolous return penalty pursuant to TG § 13-705 that was supported by evidence and testimony on the administrative record?

The Tax Court ruled on the above issues but issued an order that did not specifically address the above issues and did not specify any findings of fact

or conclusions of law to support the MTC's affirmation of the Comptroller's assessment.

The most significant event at the MTC hearing was the quashing of the writ of summons to the Comptroller's hearing officer (Apx. A28), and the MTC judge's decision to ignore the Determination issued by Ms. Gorman; despite the fact that the MTC judge's order affirmed the Determination; the final decision of the Comptroller.

The MTC erroneously ruled that the Comptroller's hearing officer was a pseudo-judicial officer and not subject to writ of summons or subpoenas.

Other actions by the MTC to deny Mr. Bert his due process rights are too many to mention. A review of the MTC transcript by the Court will reveal the MTC's blatant denial of Mr. Bert's due process rights.

Mr. Bert was not provided an opportunity to dispute the final decision of the hearing officer because the MTC judge informed Mr. Bert that the MTC proceeding was a de novo hearing and nothing that happened previously mattered. This was a violation of Maryland's Administrative Procedures Act.

Subsequently, Mr. Bert appealed the Tax Court's decisions with the Circuit Court.

C. Proceedings in Circuit Court for Howard County

Mr. Bert timely filed a request for judicial review with the Circuit Court. The Circuit Court partially reversed the decision of the Tax Court in an order entered September 25, 2007. The Circuit

Court reversed the frivolous return penalty but affirmed all of the MTC's orders denying Mr. Bert his due process rights; which include the orders granting the quash and the denial of Mr. Bert's motion for summary judgment for failing to answer questions in Mr. Bert's MTC memorandum. The Circuit Court's decision lacked conclusions of law and findings of fact.

D. Proceedings in CSA

The Comptroller and Mr. Bert filed appeals of the Circuit Court order with the CSA, Case # 2131, September Term 2007. The CSA reversed the decision of the Circuit Court and ordered the Circuit Court to affirm all orders of the MTC (Apx. A1).

The questions presented to the CSA are as follows:

a. Did the MTC erroneously interpret TG § 13-705 (b) when it orally ruled that a TG § 13-701 penalty was not a prerequisite to a TG § 13-705 (a) penalty?

b. Was the October 20, 2005 letter from Rita Bormuth a legal and valid assessment and did Ms. Bormuth have authority to issue a TG § 13-705 penalty against Mr. Bert?

c. Did Mr. Bert's 2003 Tax Return meet the requirements for a frivolous return penalty?

E. Proceedings in Court of Appeals (COA)

Mr. Bert filed a petition for writ with the Court of Appeals, Case No. 638, September Term, 2008.

The COA denied Mr. Bert's petition for writ of certiorari April 10, 2009.

Mr. Bert filed a timely motion for reconsideration which was denied by the COA on June 19, 2009.

REASONS FOR GRANTING THE PETITION

I. Review Is Warranted To Resolve Important Questions Relating To Due Process Rights In Tax Assessment Cases

It is a serious problem when the Tax Collector of Maryland denies citizens their due process rights when assessing and collecting alleged tax liabilities and the CSA affirms this unconstitutional action by the Comptroller.

The CSA opinion concerning the Comptroller's enforcement of TG § 13-705 affirms the denial of Mr. Bert's due process rights in violation of the 5th and 14th amendment.

The Supreme Court made it clear in *Goldberg v. Kelly*, 397 U.S. 254, 270-271 (1970) that,

> In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. *E.g., ICC v.*

Louisville & N. R. Co., 227 U. S. 88, 227 U. S. 93-94 (1913); *Willner v. Committee on Character & Fitness*, 373 U. S. 96, 373 U. S. 103-104 (1963). What we said in *Greene v. McElroy*, 360 U. S. 474, 360 U. S. 496-497 (1959), is particularly pertinent here:

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that, where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment. . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types

of cases where administrative . . .
actions were under scrutiny."

In the instant case Mr. Bert as required by state and federal law submitted three documents (i.e., Form 4852, 2003 federal tax return and 2003 state tax return) signed under the penalty of perjury to establish his state tax liability. Therefore, as required by *Kelly, supra,* Ms. Bormuth and Ms. Gorman were required to disclose to Mr. Bert the findings of fact and the evidence that prove Mr. Bert's state tax return is incorrect, false or fraudulent. No documented evidence was provided.

Ms. Bormuth alleged in the October 20th assessment issued to Mr. Bert that the tax due amount on Mr. Bert's 2003 state tax return was incorrect because Mr. Bert filed a return claiming wages were not income. Mr. Bert testified at the hearing that he did not submit a return claiming wages were not income and Ms. Bormuth did not submit any evidence at the TG § 13-508 hearing that Mr. Bert could examine and show to be untrue. For example, Ms. Bormuth did not submit an adjustment from the IRS to dispute an entry on Mr. Bert's state return, federal return, or substitute W-2. Nor did Ms. Bormuth submit a W-2 to dispute Mr. Bert's substitute W-2 or any entry on Mr. Bert's state or federal return. In addition, Ms. Bormuth did not present any testimony (i.e., Mr. Bert's employer testifying to the accuracy of any applicable W-2). No other job related evidence (i.e., audit findings, investigation report) was presented by Ms. Bormuth to disprove any entry on Mr. Bert's tax return. The

only evidence was Ms. Bormuth's unproven solicited testimony by hearing officer Debora Gorman.

Despite the lack of any documented evidence disproving Mr. Bert's state tax return, Ms. Gorman affirmed Ms. Bormuth's assessment solely on Ms. Bormuth's testimony and her own personal beliefs of the tax laws.

Therefore, the denial of Mr. Bert's refund request of $5,256.42 and the assessment of the $500 frivolous return penalty against Mr. Bert were serious government actions causing financial injury. Hence, due process is an obvious right under the circumstances.

As stated previously, no documents were presented as evidence to disprove Mr. Bert's taxable income; therefore, it is a denial of Mr. Bert's due process rights to ignore his filed tax returns and make final decisions on findings that cannot be cross-examined or determined to be true.

The Comptroller of Maryland has taken the position in the instant case that because Mr. Bert filed a tax return that was incorrect it was proper to assess a frivolous return penalty pursuant to TG § 13-705, versus a false return penalty (TG § 13-703), and/or a failure to provide or providing false income tax withholding statement (TG § 13-706); or the more serious criminal offenses such as willful failure to file return (TG § 13-1001) and willfully filing false return (TG § 13-1002).

In the instant case the Comptroller's assessment of a frivolous return penalty reflects what the Seventh Circuit anticipated in *United*

States v. Moore, 627 F.2d 830, 834(1980) wherein, the Seventh Circuit stated:

> It is important to harmonize the various tax crime laws. The government apparently prefers to charge tax protestors with failure to file -- § 7203, a misdemeanor, rather than tax evasion -- §7207, or making false returns--§ 7206, both felonies. A serious problem might be presented if the government took the position that any form with false information on it is not a return. That is not our situation. It is not the false data which makes these returns defective, but the fact that there is no real attempt to comply with the requirement of filing a return.

However, that is exactly, the position the Comptroller and the MTC took in the instant case; that because they have determined that the information on Mr. Bert's tax returns was inaccurate the return filed by Mr. Bert was not a return, and thus frivolous.

As predicted by the Seventh Circuit the Comptroller of Maryland chose to deem Mr. Bert's tax return not a return (i.e., frivolous) based on the unsubstantiated allegation that the return contained false information. Thereby, denying any opportunity of due process to argue the validity of any entry on the return.

However, despite the fact that there is no evidence in the record alleging Mr. Bert has

submitted incorrect, false or fraudulent information on his submitted 2003 state income tax return, the CSA states on page 1 of its opinion (Apx. A2) "Bert put a zero on line 7(A)(a) even though the correct figure should have been $77,779.00."

The correctness of a figure on a document that has been signed under the penalty of perjury is a serious matter and the issue must be litigated via due process. The Supreme Court ruled in *United States v. Cheek,* 498 US 192, 112 L Ed 2d 617, 111 S Ct-Summary:

> On certiorari, the United States Supreme Court vacated the Court of Appeals' judgment and remanded the case for further proceedings. In an opinion by WHITE, J., joined by REHNQUIST, Ch. J., and STEVENS, O'CONNOR, and KENNEDY, JJ., it was held that (1) in a prosecution, under sections 7201 and 7203, for "willfully" attempting to evade federal income taxes and "willfully" failing to file federal income tax returns, (a) there is no requirement that a defendant's claimed good-faith belief must be objectively reasonable if the claimed belief is to be considered as possibly negating the Federal Government's evidence purporting to show a defendant's awareness of the legal duty at issue,

The *Cheek, supra,* decision by this Court is in opposition to the decision by the Maryland CSA, wherein (Apx. A19) the CSA states:

> We agree with the Tax Court and disagree with the circuit court. Some beliefs held by individuals are completely illogical though strongly embraced. It is therefore at least possible that Bert believes his position is valid. But the mere fact that Bert is sincere in his belief does not mean that a $500.00 penalty should not have been imposed pursuant to section 13-705(a)(2)(ii).

In other words, the CSA has ruled Mr. Bert's illogical beliefs concerning the meaning of IRC statutes 3401 and 3121 do not meet the requirement of a legitimate dispute pursuant to TG § 13-705(a)(2)(ii)(3); despite the Supreme Court's ruling that there is no requirement that a good-faith belief must be objectively reasonable if the claimed belief is to be considered as possibly negating the state government's evidence purporting to show Mr. Bert's awareness of his legal duty to enter the correct number on his state income tax return.

It is the Supreme Court's decision in the *U.S. v Cheek* case that influences the Comptroller to assess Mr. Bert a frivolous return penalty versus a criminal willfully filing false returns offense (punishable by the penalty for perjury – up to 3 years imprisonment). The criminal offense places the burden on the Comptroller; however, the

Maryland courts have ruled that the burden of proof is on the citizen if he is assessed a frivolous return penalty by the Comptroller. However, Title 26, IRC sections 6702 and 6703 makes it clear that the burden of proof in a frivolous return penalty case is on the secretary (i.e., the Comptroller).

Therefore, it is erroneous and a denial of due process for the CSA to state in its opinion (Apx. A20) that:

> Bert's position was based, in its entirety, on the fact that he filed a false form 4852 that allowed him to make the claim to State and Federal tax collectors that his adjusted income for 2003 was zero. As the Court of Appeals said in *Winters v. State,* 301 Md. 214, 235 (1984), to advance such an argument is to engage in "pure sophistry." *See* Note 4, *supra.* Therefore, no legitimate dispute existed and the requirements of § 13-705(a)(2)(ii) were met.

Hence, the CSA and the Comptroller invoke the criminal offense statute TG § 13-1002 when they claim Mr. Bert filed a false form 4852 or allege the same circumstances as *Winters v. State,* wherein Winters was indicted on criminal tax offenses. However, as the Court knows, Mr. Bert has never been charged with a criminal tax violation or the civil penalty of filing a false return (TG § 13-703).

The TG § 13-703 penalty is 100% of the underpayment of tax. However, Mr. Bert did not

have an underpayment of tax. Mr. Bert was due a refund. Therefore, if the Comptroller assessed Mr. Bert a false return penalty he would not be able to increase Mr. Bert's tax liability because he had no underpayment. If the Comptroller assessed Mr. Bert a TG § 13-706 penalty it would only be a $50 penalty.

However, a $500 frivolous return penalty does increase Mr. Bert's tax liability and the Maryland administrative and judicial process in place never gives a Maryland citizen, including Mr. Bert the opportunity to argue the validity of his submitted tax return or dispute the unofficial denial of his request for refund, or the opportunity to dispute the unofficial assessment of income taxes.

According to the judicial courts in the state of MD tax collection officials are allowed to commit mail fraud by issuing tax assessments that they know are invalid and unauthorized.

The CSA acknowledged in its opinion (Apx. A2) that "Rita Bormuth, an employee of the compliance program section, tax investigation unit of the Comptroller's office, issued a tax assessment against Bert, dated October 20, 2005."

What the CSA does not acknowledge is that Rita Bormuth was not an authorized tax collector with authority to issue tax assessments or penalties.

Ms. Bormuth issued an assessment claiming the authority of TG § 13-705; however, she was not a tax collector as defined by TG §§ 1-101 (e) and 13-101 (c) cited in Ms. Gorman's notice of final determination.

Ms. Bormuth's authority to assess a penalty has been an issue at every level of proceedings in this case.

Finally, the authority to audit, correct and adjust a tax return granted Ms. Bormuth cannot be the same as the authority of a tax collector to determine that the tax due exceeds the amount shown on the return and has the authority to assess the deficiency. Ms. Bormuth's job description clearly states that she will appear at TG § 13-508 hearings as a witness; additional evidence that Ms. Bormuth did not have the authority of a tax collector to issue an assessment.

A. Denial of Due Process By State Government Violates Fifth And Fourteenth Amendment

Mr. Bert filed three documents with the Comptroller for tax year 2003 under the penalty of perjury to support his claim for a refund. However, Ms. Bormuth without legal authority changed Mr. Bert's tax return to make the determination that his return was frivolous.

Subsequently, according to the courts in MD, Ms. Bormuth does not have to produce any evidence to substantiate the change made to Mr. Bert's tax return. A clear violation of Mr. Bert's due process rights.

This case raises the critically important question of how far a state court can go to assist in the collection of illegal and erroneous tax assessments.

Although no court decision below made a finding of fraud or alleged fraud, the CSA made an erroneous and unethical finding of fact of fraud to support its reversal of the Circuit Court's decision in this case (that reversed the MTC's affirmation of the Comptroller's assessment of a frivolous return penalty).

Hence, Mr. Bert never had an opportunity to deny or cross-exam any evidence supporting the allegation of a fraudulent return. Consequently, the CSA's opinion does not identify any evidenc suppporting fraud. Instead the CSA made a totally different unsubstantiated claim than what the Comptroller, hearing officer, and MTC made when they claimed Mr. Bert's return was incorrect.

The flawed and inconsistent enforcement of the tax laws by the Maryland judicial system deny citizens their due process rights.

II. Review Is Warranted Because The Decisions Below Create A Direct And Acknowledged Conflict With The Seventh And Ninth Circuits Concerning A Valid Tax Return For The Purpose Of Tax Assessment Review.

If failing to file a tax return is a criminal act punishable by prison time, then filing a false return must also be a serious offense and the administrative and judicial process necessary to prove such an offense should not be ignored and treated lightly by government employees.

A return completed and signed under the penalty of perjury was found to be a valid return by the Seventh Circuit and Ninth Circuit.

What is at issue before the MTC is Mr. Bert's submitted Maryland 2003 income tax return. What is specifically at issue is whether the 2003 tax return filed by Mr. Bert is a valid return.

There are strong precedents concerning this very issue from the Courts of Appeals for the Seventh, Ninth, and Tenth Circuits. According to the decisions from these courts "The determination of what is an adequate return is a legal question and it was proper for the district court to decide that question." *See United States v. Moore*, 627 F.2d 830, 834 (7th Cir. 1980).

Synonymous with TG § 10-804 of the Maryland Annotated Code (Section 6065) the Seventh Circuit discusses what constitutes an adequate return in *Moore, supra*:

> Section 6065 (section 6065(a) at the time defendant filed his returns) states that "any return. . . required to be made under any provision of the internal revenue laws or regulations shall contain or be verified by a written declaration that it is made under the penalties of perjury." In 26 C.F.R. § 1.6065-1(a) the Secretary of the Treasury has by regulation also required income taxpayers to verify their returns. Defendant had a duty by statute and regulation to file tax returns with a verified signature.

Obviously, the return filed by Mr. Bert signed under the penalty of perjury was a verified return.

The Seventh Circuit also clearly addresses the issue of zeroes on a tax return in *Moore*:

> The Ninth Circuit, however, has taken the opposite position. In *United States v. Long,* 618 F.2d 74, 75 (9th Cir. 1980), the taxpayer submitted a form with zeroes in all the blanks. The court held that even if this information was false, a tax liability could be computed from it and it was therefore an adequate return. Part of the court's rationale appeared to be that a different penalty could be levied against those who took the chance of supplying false information. *Id.* At 75 n. 4. *Cf. United States v. Schmitz,* 542 F.2d 782, 783, 783 (9th Cir. 1976), *cert. denied,* 429 U.S. 1105, 97 S.Ct. 1134, 51 L.Ed.2d 556 (1977), where the same court affirmed a conviction involving a return with zeroes and small amounts, although this was not an issue on appeal.
>
> The Ninth Circuit is clearly correct in stating that a tax liability could be computed from zeroes, or from small amounts. The fact that the information is inaccurate only means that the tax owed, if any, will be wrong, not that it cannot be calculated. When

> the income information is incomplete, a more difficult problem is presented, but as long as a total income figure is given, the I.R.S. could compute the tax. Certainly a bright line rule that even a form with inaccurate or incomplete income information is a return would be easier to enforce.

Mr. Bert's return had amounts in all required places. Therefore, a liability could be computed. The Comptroller also stipulated that withheld amounts identified on Mr. Bert's returns and Form 4852 were accurate. Hence, not only are Mr. Bert's returns verified, they are adequate to compute a tax liability; which means by definition that Mr. Bert's return for 2003 cannot be frivolous.

In addition, the Seventh Circuit states in *Moore*:

> There must also be an honest and reasonable intent to supply the information required by the tax code. *See Germantown Trust Co. v. Commissioner,* 309 U.S. 304, 308-09, 60 S.Ct. 566, 568, 84 L.ed. 770 (1940); *Florsheim Brothers Co. v. United States,* 280 U.S. 453, 462, 50 s.Ct. 215, 74 L.Ed. 542 (1930). In *Zellerbach Paper Co. v. Commissioner, 293* U.S. 172, 180, 55 S.Ct. 127, 131, 79 L.Ed. 264 (1934), it was said that:
>
> "Perfect accuracy or completeness is not necessary to reduce a return from

> nullity, if it purports to be a return, is sworn to as such, and evinces an honest and genuine endeavor to satisfy the law." (citation omitted.)

Mr. Bert showed honest and reasonable intent to supply the information required by the tax code when he provided the Comptroller with copies of his Form 4852 and federal income tax return. In addition, Mr. Bert cited the tax laws he was following on his tax reports and most importantly he made an honest request for a refund.

Upon review, the CSA did the same thing the Comptroller and the MTC did, except the CSA independently determined that the information Mr. Bert placed on his return was fraudulent and thus supported the imposition of the frivolous return penalty. However, as stated by the Seventh Circuit if there is clear and convincing evidence that Mr. Bert placed false information on his tax return, in the state of Maryland he should be charged with willfully filing a false return (TG § 13-1002) or assessed a false return penalty (TG § 13-703), and/or a failure to provide or providing false income tax withholding statement penalty (TG § 13-706).

Mr. Bert testified that he was required by Maryland law to enter his federal adjusted gross income from his federal return. As evidence that the amount on line 1 was correct, Mr. Bert signed his income tax return under the penalty of perjury pursuant to TG §§ 10-804(a), (b)(1) and c. Mr. Bert also submitted a copy of his federal income tax return signed under the penalty of perjury and

substitute W-2 signed under the penalty of perjury pursuant to TG §§ 10-804(e)(1), (2) and (3)(i) and (ii). However, the Comptroller did not present any evidence or testimony to dispute the amounts on line 1 of Mr. Bert's tax returns.

As clearly stated by the Seventh Circuit an erroneous, fraudulent or incorrect entry on a return does not of and by itself make a return invalid or frivolous

III. Immediate Review Is Urgently Needed

In these difficult economic times states are seeking additional means to collect operating capital. Therefore, the tax collection system already in place is the perfect vehicle to increase state coffers by the use of aggressive and sometimes illegal actions. Therefore, it is imperative that the Supreme Court review the opinion of the MD CSA in this case because it is the model for illegal and erroneous tax assessment collection by government agencies and their employees.

The controlling statutes in this case are the 5th and 14th amendments of the Constitution. The 4th amendment states "No person shall be – deprived of life, liberty, or property, without due process of law; and the 14th amendment states "-nor shall any state deprive any person of life, liberty, or property, without due process of law". The Comptroller of Maryland violates both of these amendments in the manner that they enforce TG § 13-705. This MD statute is sysnonymous with its federal sister 26 U.S.C. § 6702. TG § 13-705 is titled "Frivolous income tax returns" and 26 U.S.C. § 6702 is titled "Frivolous tax submissions". The criteria for

frivolous is almost identical in the two statutes. 26 U.S.C. § 6702(e) also reflects that the penalties in the statute are penalties in addition to other penalties; which is synonymous with TG § 13-705 (b), which states:

> *(b) Additional to other penalty.* — The penalty under subsection (a) of this section is in addition to any penalty assessed under TG § 13-701 of this subtitle.

In the instant case TG § 13-701 does not apply for tax year 2003 because the petitioner filed a tax return and the alleged unpaid tax (i.e., tax owed) was paid as confirmed by Ms. Gorman's determination which clearly states that petitioner was due a [disputed] refund of $25.63 [Mr. Bert claimed a refund of $5,230.79].

Hence, the alleged penalty assessment issued by Ms. Bormuth and affirmed by Ms. Gorman is clearly erroneous.

Based on TG § 13-705 (b) alone the 2003 determination of Ms. Gorman should be reversed and the decision by Ms. Bormuth to assess a frivolous return penalty deemed erroneous.

In *Comptroller v. Kolzig*, 375 Md. 562 (2003) the court stated;

> "Thus, when the language of a statute is plain and unambiguous a court may neither add nor delete language so as to "reflect an intent not evidenced in that language," *Condon v. State*, 332 Md. 481, 491, 632 A.2d 753, 755 (1883), or

> construe the statute with "forced or subtle interpretation" that limit or extend its application: *Id*, (quoting *Tucker v. Fireman's Fund Insurance Co.*, 308 Md. 69, 73, 517 A.2d 730, 732 (1986)).
>
> In that regard, we begin our inquiry with the words of the statute and, when the words of the statute are clear and unambiguous, according to their commonly understood meaning, we ordinarily end our inquiry there also. *Chesapeake and Potomac Tel. Co. v. Dir. of Fin. For Mayor and City Council of Baltimore*, 343 Md. 567, 578-579, 683 A.2d 512, 517 (1996).

The title of subsection 13-705 (b) ("Additional to other penalty") is all that is needed to understand that the frivolous return penalty is an "additional" penalty [specifically to TG § 13-701] and is not issued as a separate singular penalty as ruled by the Comptroller and the MTC.

Therefore, the following statement by the MTC Judge on page A8 of the CSA's opinion is erroneous:

> Secondly, the provision that you refer to under (b), Additional to other penalty, doesn't mean that there has to be another penalty imposed. It just means that this frivolous income tax return penalty is in addition to, not a condition – it doesn't have to be a – but

> it doesn't have to be a penalty as a condition precedent to this penalty, it's in addition to, which is quite a bit different. If the Legislature had intended there to be a condition precedent to a frivolous income tax return, they would have said it. So the plain and ordinary meaning of this statute is very clear to me that no penalty has to be imposed under 13-701 for a penalty to be imposed under 13-705.

Obviously, the MTC judge's interpretation of TG § 13-705(b) is erroneous. The Legislature clearly stated the frivolous return penalty is an addditional penalty; as is the federal frivolous return penalty.

Finally, why would the Legislature want the Comptroller to assess an individual a $500.00 frivolous return penalty if he paid the tax when due and properly filed a tax return requesting a refund? The Legislature could only reasonably be interested in assessing a frivolous return penalty when the return filed by an individual resulted in the tax not being paid when due. Otherwise, the Comptroller merely denies the individual's refund request and the controversy is ended.

However, if somehow the Court should find that TG § 13-705 (a) does apply, the Comptroller has failed to provide undisputed facts, testimony or evidence that establishes the petitioner's entries on his tax return were frivolous.

A penalty under this section requires the following elements: "the substantial correctness of the tax may [not] be determined, or [the tax return] contains information that, on its face, indicates the tax reported on the return is substantially incorrect", and "must also be accompanied by either facially obstructionist conduct" or "a position that is frivolous because the position has no basis in law or fact, is patently unlawful, and does not involve a legitimate dispute or reflect an inadvertent mathematical or clerical error." Md. Code § 13-705 (some internal punctuation omitted)

Mr. Bert's return is not frivolous under TG § 13-705(a)(1)(i) because the only way that a return could "...not contain information on which the substantial correctness of the tax may be determined" would be if one of the numbers needed to make the assessment calculations were missing. That's what "not contain" means, that something isn't there. In Mr. Bert's case that is not so; all the numbers are there, and all the information needed to determine the correctness of the tax is right there; the starting point of which is the federal adjusted gross income from Mr. Bert's federal tax return, just as Maryland law requires. Therefore, that rules out TG § 13-705(a)(1)(i).

In order for Mr. Bert's return to be deemed "frivolous" under the requirements of TG § 13-705(a)(1)(ii) there must be an affirmative answer to the question: Did Mr. Bert file a tax return that contained information that, on its face, indicated the tax reported on the return was substantially incorrect? Another way of phrasing this question is asking; did Mr. Bert supply any information that

indicated that the tax he claimed to owe was wrong? Analyzed further, it really means did Mr. Bert supply any information that contradicted itself? The answer is "no". Everything Mr. Bert submitted was completely consistent with the amount of tax he claimed he owed. Therefore, Mr. Bert's return does not meet the requirements of containing information on which the substantial correctness of the tax may not be determined.

The Comptroller may dispute Mr. Bert's federal adjusted gross income amount entered on Mr. Bert's return; however, the entry correctly establishes the tax liability entered on Mr. Bert's state tax return. If the Comptroller changes Mr. Bert's adjusted gross income amount on his tax return to something determined by the Comptroller, the Comptroller is no longer analyzing Mr. Bert's return on its face.

In addition, if Mr. Bert's returns did not contain information on which the substantial correctness of the tax may be determined, the Comptroller would not be able to adjust the returns as stated by Ms. Bormuth in her October 20, 2005 letter.

Therefore, neither TG § 13-705(a)(1)(i) or TG § 13-705(a)(1)(ii) applies to Mr. Bert's tax returns, eliminating the possibility of the assessment of a frivolous return penalty for tax year 2003.

Mr. Bert's return does not fall within the statutory language of TG § 13-705(a)(2)(i) because his return did not delay or impede the administration of the provisions of Title 10. The Comptroller (despite the fact that his action was erroneous)

adjusted/corrected Mr. Bert's returns and promptly assessed him an additional tax and penalty.

Finally, Mr. Bert's return does not meet the requirements of TG § 13-705(a)(2)(ii) because Mr. Bert's tax return was based on laws (IRC §§ 3121 and 3401) and facts identified on his federal return and substitute W-2; the Comptroller has not accused Mr. Bert of doing anything patently unlawful; and a review of Ms. Gorman's Determination clearly indicates that Mr. Bert had a legitimate dispute that was argued at the informal hearing. Most importantly, the Circuit Court judge determined as fact that Mr. Bert had a legitimate dispute

The Court should note that Ms. Gorman's Determination has conveniently omitted ground 3 *(does not involve a legitimate dispute or reflect an inadvertent mathematical or clerical error)* required for a frivolous position. Ground 3 was the basis the Circuit Court used when it decided to reverse the MTC's affirmation of the frivolous return penalty.

However, petitioner argues that none of the required grounds apply to his return.

The only ground cited by Ms. Bormuth in her October 20, 2005 letter was that *"You have submitted a Maryland Income tax return for 2003 and have indicated that wages are not income subject to taxation."*

The courts of Maryland have clearly resolved the issue of Maryland adjusted gross income and federal adjusted gross income.

The following laws and cases provide additional precedent for the instant case:

a) TG § 10-107. Application of federal income tax law.

b) TG § 10-203. In general.

TG § 10-107 expresses a policy of comity that, when exercising any legislatively-authorized powers that parallel an I.R.C. provision, the Comptroller must comply with the judicial and administrative interpretations of the federal statute. The Appellate court noted as much in *Lyon v. Campbell,* 324 Md. 178, 185, 596 A.2d 1012, 1015 (1991):

> Section 10-107 applies where the Maryland tax code is 'inextricably keyed'" to the federal tax code "by virtue of its adoption of the federal law." *Comptroller v. Chesapeake Corp.,* 54 Md. App. 208, 213-14, 458 A.2d 459, 463 (1983). It avoids the "anomalous result" of the taxpayer achieving a different result regarding payment of Maryland tax where the Maryland tax provision incorporates the federal tax provision. *See Comptroller v. Diebold, Inc.,* 279 Md. 401, 409, 369 A.2d 77, 82 (1977) (holding that where the Maryland tax code incorporates a federal tax code provision, the interpretation of the Maryland and federal tax provision should be consistent).
>
> Section 10-107 does not grant any authority to appellant [Comptroller]. The statute merely states that, when appellant

[Comptroller] is specifically empowered to enforce an I.R.C. provision, it must obey the previous administrative and judicial interpretations of the tax law at issue as precedent. The statute does not allow appellant [Comptroller] to put forth its own interpretation that a federal tax law is incorporated into the Maryland tax code. *See Comptroller of the Treasury v. Gannett Co., Inc.* 356 Md. 699, 707-08, 741 A.2d 1130, 1135 (1999).

Because appellee [taxpayer] complied with both the statute and the regulation, the — taxable income figure is correct as reported on its federal tax return. As we noted, *supra,* appellant [Comptroller] may enforce a mandatory provision, like I.R.C. § 7872, to ensure that the federal taxable income figure transferred to the Maryland tax form is correct. Appellant [Comptroller] wishes to take the auspices of I.R.C. § 7872 a step further, however, and impute income for purely State income tax purposes. This it cannot do, once the federal taxable income figures are verified as true and correct under the mandatory I.R.C. provisions, appellant [Comptroller] must accept those figures. See *Comptroller of the Treasury v. Gannett Co., Inc.* 356 Md. 699, 707-08, 741 A.2d 1130, 1135 (1999); wherein the Court also states: "When

> ambiguities arise in construing tax statutes, Maryland courts must interpret tax code provisions that aid in determining taxable income in the taxpayer's favor.
>
> If the IRS fails to impute discretionary federal taxable income to the taxpayer, appellant [Comptroller] must accept that determination, and the resulting federal taxable income figure, as the Maryland modified income. As we noted in *Marco Associates,* 265 Md. at 676, 291 A.2d at 493, "[t]his may not be fair, but it is a fact of life." [relevant detail added].

In every case cited by the Comptroller wherein the court determined the individual's wages were taxable, there was a finding of fact that the adjusted gross income entered on the tax return was incorrect, fraudulent or false. There is no evidence in this case that proves Mr. Bert's adjusted gross income is incorrect, fraudulent or false. Therefore,

> Where there is doubt as to the scope of the statute ...it should be construed most strongly in favor of the citizen and against the state. (Citing F. & *M Schaefer Brewing Co. v. Comptroller,* 255 Md. 211, 257 A.2d 416 (1969); *McConihe v. Comptroller,* 246 Md. 271, 228 A.2d 432 (1967); *Fair Lanes, Inc. v. Comptroller,* 239 Md. 157, 210 A.2d 821 (1965); *M.E. Rockhill,*

Inc., 205 Md. 226, 107 A.2d 93).
[*Comptroller of the Treasury v. Gannett Co., Inc.* 356 Md. 699, 707-08, 741 A.2d 1130, 1135 (1999)].

The Comptroller argues that Mr. Bert has submitted a frivolous tax return. However, the only evidence the Comptroller has submitted to the MTC to substantiate this claim is a computerized Electronic W-2. The Comptroller also solicited testimony from respondent's witness Pamela Porter and Mr. Bert as evidence that Mr. Bert received wages in the subject year. However, even if the Comptroller's claims of Mr. Bert's compensation were true they do not justify the Comptroller assessing Mr. Bert a $500.00 frivolous return penalty.

The Comptroller submitted as evidence an electronic W-2 that was obtained from the Comptroller's computer system for tax year 2003 for Mr. Bert. Mr. Bert objected to the Comptroller submitting this document as evidence based on relevance and a lack of certification. Ms. Porter testified that the document presented to her by the Comptroller was an "electronic W-2 that was obtained from the Comptroller's computer system for the tax year at issue". However, she did not testify that Mr. Bert had taxable wages for year 2003. Finally, Ms. Porter did not testify that Mr. Bert's federal adjusted gross income entered on his Maryland tax return was incorrect, frivolous or fraudulent.

Hence, pursuant to IRC § 6703 the burden is on the Comptroller to prove that Mr. Bert's

testimony, Maryland tax return, federal tax return and substitute W-2 are erroneous.

CONCLUSION

First, it is clear that the Maryalnd Legislatures' intent was to only assess an individual a frivolous return penalty if the tax was not paid when due or a valid return was not filed. By the Comptroller's own admission Mr. Bert was due a refund, therefore, TG § 13-705(b) is applicable and the Comptroller has no authority to assess Mr. Bert a TG § 13-705(a) frivolous return penalty.

Second, the Seventh Circuit has established the precedent in this case in regards to what is considered a verified and adequate return. Mr. Bert's return has been verified and deemed adequate according to the Seventh Circuit in *United States vs. Moore*.

Third, Mr. Bert's return does not meet the criteria of a frivolous return penalty since the Seventh Circuit has established that a zero on a return does not invalidate the return. Therefore, Ms. Bormuth's assessment was erroneous.

Finally, the CSA erroneous finding of fact in regards to Mr. Bert's alleged fraudulent information on his return is no longer relevant since the Seventh Circuit has established that even false information does not prevent the Comptroller from determining whether Mr. Bert's tax liability and refund request are accurate.

However, as stated by the Seventh Circuit the Comptroller would rather assess Mr. Bert a frivolous return penalty instead of a false return penalty; which is a problem and an erroneous

application of TG § 13-705. In addition, the CSA 's affirmation of the MTC's order affirming the Comptroller's illegal and erroneous penalty assessment is a violation of Mr. Bert's 5th and 14th amendment rights.

Therefore, it was an error for the CSA to reverse the decision of the Circuit Court and affirm the frivolous return penalty. Most importantly, the CSA failed to identify the reversible error committed by the Circuit Court.

Finally, the CSA identifies no findings of fact or conclusions of law to support their allegation that Mr. Bert filed a fraudulent substitute W-2 (Form 4852). Nor does the CSA identify any findings of fact or conclusions of law that support a frivolous return penalty.

It is imperative that the Supreme Court review this case because the Comptroller of Maryland is using the erroneous application of TG § 13-705 and other tax statutes with the assistance of the Maryland courts to deny Maryland citizens their 5th and 14th amendment rights.

Most importantly, with the cost of litigating a tax controversy being so high that the litigation cost in most cases will far exceed the liability at issue, it would be almost impossible for a citizen to receive due process of law when contesting an erroneous determination. As in the instant case, the Comptroller would appeal any adverse decision from the MTC, Circuit Court, CSA and COA. Subsequently, the citizen may be required due process; however, he would not be able to afford it.

Therefore, the vast majority of citizens settle the tax controversy in dispute to avoid legal expenses.

For example, no lawyer would litigate this case because the legal expenses to contest the tax liability at issue would far exceed the tax due. Therefore, this case has only reached the Supreme Court because Mr. Bert has chosen to proceed pro se.

Therefore, it is ridiculous for government officials to claim that the income tax system in the United States is voluntary when the normal citizen cannot contest an erroneous tax assessment because he is denied due process by either a flawed administrative procedure or by legal costs.

WHEREFORE, Mr. Bert prays that the Court grant Mr. Bert his petition for writ of certiorari.

Respectfully Submitted,

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UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2131

September Term, 2007

COLVIN I. BERT

V.

COMPTROLLER OF THE

TREASURY

Salmon,
Woodard,
Wenner, William W.,
(Retired, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: November 24, 2008

13C0600067541

Colvin I. Bert ("Bert") worked for the Data Computer Company of Ellicott City, Maryland in 2003. As Bert was later to admit in his testimony before the Maryland Tax Court, he received compensation from Data Computer Corporation in 2003 of approximately $77,779.00.

On October 7, 2005, Bert signed a Federal Tax Return for the 2003 tax year.[1] Attached to that tax return was form 4852, which is a form to be used by employees whose employers have failed to supply them with a completed W-2 form. Question 7 A(a) on form 4852 reads: "Wages (Note: Include) (1) The total wages paid (2) Non- Cash payments, (3) Tips/Reported and (4) All other compensation before deductions for taxes, insurance, etc." (Emphasis added.) Bert put a zero on line 7(A)(a) even though the correct figure should have been $77,779.00.

On the same date that he signed his Federal Tax return for 2003, Bert also signed his Maryland Tax Return for that year. Attached to his State Tax return was the same substitute W-2 form that Bert filed with the IRS. That substitute W-2 form showed that Bert had received no wages in 2003.

Line 1 on Bert's Maryland Tax Form reads "Adjusted Gross Income from Federal Return." On line 1, Bert entered the figure zero. He requested a tax refund of $5,256.42.

Rita Bormuth, an employee of the compliance program section, tax investigation unit of the Comptroller's office, issued a tax assessment against

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[1] The form filed with the IRS was signed under the penalties of perjury. Above Bert's signature he wrote the words: "All Rights Reserved."

Bert, dated October 20, 2005. The assessment included a $500.00 penalty for filing a frivolous return. *See* Maryland Code (2004 Repl. Vol.), Tax - General Article, § 13-705. The assessment set forth a corrected refund of $25.63 instead of the $5,256.42 requested.

Upon receipt of the assessment, Bert asked for a hearing, which was held on February 22, 2006. The hearing officer, Debora Gorman, upheld the assessment imposed by Ms. Bormuth.

Bert appealed to the Maryland Tax Court where a *de novo* hearing was conducted. Bert testified: "I'm required by law to take the Federal Adjusted Gross Number from my Federal Return, right or wrong, and put it on my State Return."

Bert also said:

> So my testimony is that, most recently, I received a document from the IRS stating that they are still reviewing my 2003 tax return, and they have not determined that I have a tax liability, as of yet, which therefore means that my Federal adjusted gross income amount has not changed on my Federal tax return. So, therefore, it's the correct number on my State tax return; and, to my knowledge there is no law that allows someone to change that, unless they have another document that's been signed under the penalty of perjury that says the actual number is this versus what I put on that return.

The above argument, of course, overlooked the inconvenient fact that the way he was able to claim zero dollars as adjusted gross income on his Federal return was due to the fact that he lied when he filled in line 7 A(a) on form 4852.

In his final argument to the Maryland Tax Court, Bert said:

> I issued with my Federal return a substitute W-2 form based on my interpretation and others' interpretations of two statutes under the Code stating that compensation is not always taxable income, okay? I am stating that the States in this country have honored those statutes and provided tax payers with refunds. The IRS honored those statutes and granted tax payers refunds. To date, the IRS ... based on my Federal returns, has not come back to me and said that what I have put on my returns is an error or is incorrect and was not proper. There is no final decision what so ever stating that that has happened. Mr. Langbaum's [attorney for the Comptroller's office] questions regarding what I was compensated, to me, has nothing to do with whether or not the Federal adjusted gross income amounts on my Federal return is correct or not. That's where this process starts. It doesn't start before that, it starts at that point. And if he has nothing from anyone saying that what I put on there is incorrect, then there's three documents that

> say what I've stated is correct and he has none. To date there is no evidence presented in this case that says I had taxable income that I should have put on my Federal tax returns of Seventy- Seven Thousand Dollars.

Pamela Porter, a revenue administrator with the Comptroller's office, testified at the Maryland Tax Court hearing that her office had received, in the ordinary course of business, a W-2 form from Bert's employer for the 2003 tax year. The form was transmitted by a magnetic media transfer process to the Comptroller's office. The W-2 form supplied by Bert's employer showed that in 2003 Bert received wages of $77,779.03.

After hearing the evidence presented by both parties, Chief Judge Walter C. Martz, of a Maryland Tax Court ruled as follows:

> Well, Mr. Bert, you have passionately testified as to your position on the law and facts. But I just have to simply say to you that your analysis is just flat wrong and incorrect. You are employed by Data Computer Corp., you earned Seventy-seven Thousand Seven Hundred and Seventy-nine Dollars and Two Cents [sic], you filled out a return, at least three papers that say basically you had no wages and you had no income. You report zero on your Federal
> return, zero on your Maryland return

and want the Comptroller and the Court to believe that you had a basis in law and in fact to do this. And, on its face, your Federal Tax return is incorrect, your Maryland tax return is incorrect, the Form 4852 is flat incorrect. In fact, that even refers to wages and states; I have been unable to obtain form W-2 wages and tax statements. And that's your – you somehow or another file this document ... [form 4852, saying ... with] all rights reserved without prejudice, which I'm not really sure what that means, but I am sure that, based on your testimony and the testimony and the documentation provided by the Comptroller through its business records kept in the normal course of business, that you had wages that you should have reported as income.

Clearly, you were subject to the provisions of [section] 13-705 because you, in fact, filed a frivolous income tax return. It did not - Your income tax return did not contain information on which the substantial correctness of the tax could be determined. And the information, on its face, indicates that the tax reported on the return is substantially incorrect. While I'm impressed by your passion, Mr. Bert, I really question your conduct in proceeding in this fashion because it just -

it appears to me that you're trying to delay or impede the administration of the tax laws of the State of Maryland. In fact, your position has no basis in law or fact, it's patently unlawful, and does not involve any legitimate dispute or reflect any inadvertent mathematical or clerical error.

You obviously believe this position. And, I'm sorry, sir, but this is a position that if you continue to take the same, will continue to result in the Comptroller's Office filing a frivolous Five Hundred Dollar penalty against you for each and every time you take this position. You may passionately believe it, you may read these statutes, which I will admit to you are complicated, and you can take this position, you can be as passionate as you want, but it is so clear, based on the facts and based on the law, that wages are - - that's part of your adjusted gross income.

The fact that the Federal Government has not caught up to you in terms of what they're going to do, and I don't know what they're going to do, does not mean that you can presume that because they haven't made any adjustments to your return or any audits, does not mean the State of Maryland has to wait around for the Federal Government. We can't wait for

them, the Federal Government to make audits. The Comptroller's responsible for collecting and making sure that there is a proper administration of tax law and
we can't - and the Comptroller can't be delayed by the Federal Government's refusal for whatever reason, or their time schedule in terms of making audits of your return. That was one of the arguments that you make, and I just flatly disagree with it.

Secondly, the provision that you refer to under (b), Additional to other penalty, doesn't mean that there has to be another penalty imposed. It just means that this frivolous income tax return penalty is in addition to, not a condition - it doesn't have to be a - but it doesn't have to be a penalty as a condition precedent to this penalty, it's in addition to, which is quite a bit different. If the Legislature had intended there to be a condition precedent to a frivolous income tax return, they would have said it. So the plain and ordinary meaning of this statute is very clear to me that no penalty has to be imposed under 13-701 for a penalty to be imposed under 13-705.

So, based upon the facts that are set forth in the record, as well as the documentation, which clearly supports the position of the Comptroller, the

> Court has no alternative, Mr. Bert, other than to affirm the assessment that has been imposed against you, sir. Thank you.[2]

(Emphasis added.)

Bert filed a petition for judicial review in the Circuit Court for Howard Comity, in which he raised numerous issues. The circuit court, with one excep-

---

[2] What Bert tried to do in this case, is in essence, the same scheme that was tried by the appellant in the case of *Winters v. State*, 301 Md. 214, 235 (1984). In that case, Richard Winters contended that the trial court erred in not ruling in his favor as to three counts in an indictment because, purportedly, Maryland law requires a taxpayer to place on his Maryland Returns as taxable income the same figure used on his Federal return as adjusted gross income. *Id.* at 235. Winters further contended that "the fact that the figure inserted on the Federal return is a false statement is immaterial if Maryland law states that the taxpayer must use the figure inserted on his Federal tax return." In answer to that contention the Maryland Court of Appeals said: "This is pure sophistry.'While it is true that Maryland taxpayers are required to report on their Maryland return the figure reported on their Federal return as adjusted gross income, this does not authorize the reporting of a false figure on the Federal return. Obviously the Maryland law contemplates the truthful reporting of income on the Federal return; otherwise a defrauding taxpayer, while subject to Federal prosecution, would escape State prosecution, a *result* hardly contemplated by the legislature.... " *See also, Comptroller of Treasury v. Colonial Farm Credit*, 173 Md. App. 173, 183 (2007) ("if a taxpayer fails to report certain income on its Federal tax return that the I.R.C. [Internal Revenue Code] mandated it to report, and the IRS accepted that figure, [the Comptroller] should be permitted to recalculate the Maryland modified income because the Federal taxable income figure it relies on would be incorrect.") *(quoting Comptroller v. Gannett Co., Inc.*, 356 Md. 699, 716 (1999).

tion, upheld all the actions taken by the Comptroller and by the Tax Court with respect to Bert's 2003 Maryland income tax liability. The exception was that the circuit court reversed the imposition of a $500.00 penalty for filing a frivolous return.

Bert then filed the subject appeal. A cross-appeal was filed by the Comptroller in which the cross-appellant challenged the circuit court's reversal of the Maryland Tax Court's decision to uphold the imposition of a $500.00 penalty.

While the appeal was pending, the Comptroller filed a motion to dismiss Bert's appeal based on the fact that Bert's brief was due to be filed on or before April 1, 2008, yet, without leave of court or an agreement from the Comptroller's office, Bert filed his brief on May 1,2008.

I

The Motion to Dismiss

Four days prior to the date Bert's brief was due, on March 27, 2008, Bert filed a document entitled "Stipulation for Extension of Time." In that document he said: "appellant stipulates that his brief will be filed by May 1, 2008." The Comptroller immediately filed a response in which the appellee cross-appellant opposed an extension. The Comptroller asserted that at no time had the Comptroller, or its counsel, been asked by the appellant, verbally or in writing, to stipulate to an extension of time for the filing of appellant's brief and in fact, the Comptroller's office did not so stipulate.

No order was filed by this Court extending the date for the filing of Bert's brief beyond April 1, 2008.

Md. Rule 8-502(b) states:

> The time for filing a brief may be extended by (1) stipulation of counsel filed with the clerk so long as the appellant's brief and the appellee's brief are filed at least 30 days, and any reply brief is filed at least ten days, before the scheduled argument, or (2) order of the appellant court entered on its own initiative or on motion for filed pursuant to Rule 1-204.

The excuse Bert gives in his response to the motion to dismiss, which appears in his reply brief, is that he interpreted the phrase "stipulation of counsel" as used in Rule 8-502(b) to mean that he alone could extend the time for filing of a brief without the concurrence of his opponent. In other words, he contends that he believed that the Rule allowed him to stipulate with himself. This excuse is preposterous. Bert, who is obviously an educated man, could not possibly have interpreted Md. Rule 8-502(b) as he claims he did. The absurdity of his excuse is only rivaled by the preposterous nature of the claim he made before the Maryland Tax Court and the arguments he sets forth in his brief.[3]

---

[3]In his brief, Bert explains his position as to why he may have had zero income.

He now says:

> The Comptroller and the MTC [Maryland Tax Court] act as if it is impossible for an individual to have earned wages for services but not have any taxable income.

However, the petitioner suggests that this situation happens quite often under numerous circumstances.

For example, Mr. Bert could have earned wages from Data Computer Corporation while working outside the continental United States. If this were the case IRC § 911(a) would apply.

This statute reads, in relevant part:

> IRC Sec. 911. Citizens or residents of the United States living abroad a) Exclusion from gross income
>
> At the election of a qualified individual (made separately with respect to paragraphs (1) and (2)), there shall be excluded from the gross income of such individual, and exempt from taxation under this subtitle, for any taxable year –
>
> (1) The foreign earned income of such individual, and
>
> (2) The housing cost amount of such individual.
>
> b) Foreign earned income
>
> (1) Definition
>
> For purposes of this section –
>
> (A) In general
>
> The term "foreign earned income" with respect to any individual means the amount received by such individual from sources within a foreign country or
>
> [3] (... continued)
>
> countries which constitute earned income attributable to services performed subsection (d) (1), whichever is applicable
>
> (2) Limitation on foreign earned income
>
> (A) In general

The foreign earned income of an individual which may be

excluded under subsection (a)(1) for any taxable year shall not exceed the amount of foreign earned income computed on a daily basis at an annual rate equal to the exclusion amount for the calendar year in which such taxable year begins.

(D) Exclusion amount

(i) In general

The exclusion amount for any calendar year is the exclusion amount determined in accordance with the following table (as adjusted by clause (ii):

for calendar year – 2	The exclusion Amount is –
1998	$72,000
1999	74,000
2000	76,000
2001	78,000
2002 and thereafter	80,000

Therefore, if IRC § 911 applied in the instant case, Mr. Bert may be able to exclude up to $80,000 of income earned during the 2003 tax year. The $80,000 exclusion amount for years after 2002 (applicable to subject year 2003) would offset the $77,790.00 amount the Comptroller claimed Mr. Bert had in wages.

In addition, the federal tax return lists numerous expenses and deductions in the section titled "Adjusted Gross Income" (lines 23 thru 32a) that could result in an individual having an adjusted gross amount that was substantially less than the wages indicated on line

[3] (...continued)

7 of the person's federal tax return.

The Court should note that the Comptroller has not submitted any evidence or testimony that suggest that the above situations did not apply in Mr. Bert's case.

For these reasons the Comptroller's motion to dismiss Bert's appeal shall be granted.

Even if the Comptroller's office had filed no motion to dismiss, we would have dismissed Bert's appeal *sua sponte* due to Bert's disregard for the rules governing appeals. *See Rollins, et. al., v. Capital Plaza Associates, L.P.*, 181 Md. App.188 (2008) (substantial violation of appellate rules of procedure warrants dismissal of appeal).

Md. Rule 8-504(a)(4) requires that appellant's brief contain a "clear concise statement of the facts material to a determination of the questions presented." No such statement is contained in Bert's brief. The Maryland Tax Court gave Bert a *de novo*

Bert listed no expenses under 23-32(a) on his 2003 federal tax return so that part of the aforementioned argument is without merit.

Moreover, in regard to Bert's claim that he could possibly have had an exclusion from gross income for monies earned abroad, it is important to make three points. First, Bert never claimed in the Maryland Tax Court that he had zero income because of a foreign tax credit. Second, Bert cites no authority, and we know of none, that would support his position that the Comptroller was required to rebut contentions never raised. Third, IRS regulations for 2003 provide that if a claim for a foreign tax credit is made the taxpayer shall enter the tax credit claimed in parenthesis on Form 1040 line 21. Next to that amount the tax payer is supposed to enter the words "Form 2555." *See* IRS Form 2555 entitled Foreign Earned Income [2003] line 43. On line 21 of the Federal tax form filed by Bert that was submitted to the Comptroller along with his Maryland tax form, he does not mention form 2555 nor did he enter any figure on line 21 in parenthesis. On line 21 he simply entered "0." Thus, it was plain on the face of the federal return that no foreign tax credit was claimed.

hearing. The correctness, *vel non,* of what the Tax Court did, or failed to do, is at the heart of Bert's appeal. Bert violated Rule 8-504(a)(4) by providing no summary of the facts presented to the Maryland Tax Court. Instead, he simply refers us to the transcript of the hearing.

Bert raises thirteen questions in his brief. His first question has three sub-questions and his last question has (at least) 14 sub-parts. But Bert did not bother to provide argument as too many of those questions presented in violation of Rule 8-504(a)(5), which requires that a party's brief contain "[a]rgument in support of the party's position." Additionally, in at least one instance, Bert supports an argument by referring us to arguments he made in a memorandum of law filed in the circuit court. This is not permitted. *See Monumental Life Ins. Co. v. U. S. Fidelity & Guar. Co.*, 94 Md. App. 505, 544 (1993).

For all the above reasons, Bert's appeal shall be dismissed.

II
The Cross Appeal

As stated in *CBS, Inc. v. Comptroller of the Treasury*, 319 Md. 687, 697-98 (1990), "[a] reviewing court must affirm [the decision of] the MTC [Maryland Tax Court] if its order is not erroneous as a matter of law, and if the order is supported by substantial evidence appearing in the record" (*quoting Ramsey, Scarlett & Co., Inc., v. Comptroller of the Treasury*, 302 Md. 825, 834 (1985)).

Section 13-705 of the Tax-General Article provides:

(a) The Comptroller shall assess a penalty not exceeding $500.00 if:

(1) an individual, as defined under § 10-101 of this article, files what purports to be an income tax return, but which:

(i) does not contain information on which the substantial correctness of the tax may be determined; or

(ii) contains information that, on its face, indicates the tax reported on the return is substantially incorrect; and

(2) the conduct of the individual is due to:

(i) a desire, apparent on the face of the return, to delay or impede the administration of the provisions of Title 10; or

(ii) a position that is frivolous because the position:

1. Has no basis in law or fact;
2. Is patently unlawful; and
3. Does not involve a legitimate dispute or reflect an inadvertent mathematical or clerical error.

(b) The penalty under subsection (a) of this

section is in addition to any penalty assessed under § 13-701 of this subtitle.

The circuit court, found that the evidence did not show that Bert's conduct was due to either a desire, apparent on the face of the return, to delay or impede the administration of the provisions of Title 10; or due to "a position that is frivolous because the position: ... 3, does not involve a legitimate dispute or reflect an inadvertent mathematical or clerical error." The circuit court explained its reasons as follows:

> I understand everything that Mr. Langbaum [attorney for the Comptroller] said about the outrageousness of Mr. Bert's position from his perspective. I mean, if I was to go out on the street, pull somebody aside, and say, 'you work. You get a W-2 at the end of the year. And you know you do. Do you think that it's okay for you to write zero on the - on the Maryland Tax Return for your adjusted federal gross income?' They would just think that that would be an outrageous position to hold.
>
> And I'm not passing on whether or not that's a legitimate position, an illegitimate position, or an outrageous position even. My concern, as it relates to the frivolous filing penalty is, that in this particular case, given this particular record, it's clear that Mr. Bert believes in his position.
>
> I mean, I'm looking at this and he filed his substitute W-2, citing Federal Tax Code Provisions that he feels sup-

ports his position. He filed the Federal Tax Return that way. He filed that State Tax Return that way. He's filed things under penalty of perjury that way. And this is ongoing litigation for him.

And as I alluded to during the proceeding, you know, there - there's no benefit for him in continuing this litigation, at least in this particular instance because, you know, for him to go through what he - I'm listening to him today. And he's put an awful lot of time and heart and soul into this. He believes in what he believes.

And I think that to interpret the statute as saying that you can't take positions without being punished for the fact you took the position, and that's the way that I kind of look at this statute; that he's taken the position - that he's being punished because he's taken this position. I - I find that - that there's a problem there.

[M]y view of it is this; that in this particular case, Mr. Bert firmly believes that what he - what he - he's doing, he's doing - he's righteous in what he's doing. And I think that the record is – supports my view of that. And I think that Judge Martz's comments are, at best, conflicting in - in the, way I way I read the – the record, as to how he views this. All right.

> And once again, the Tax Court found that he - Mr. Bert, you passionately testified, (inaudible) of fact, you obviously believe this position. But that seems to be contrary, in my mind, if the - if the statute is to be interpreted as permitting people to object to taxing and - and people to have a difference of opinion as to what the law is.
>
> It seems to me the factual findings don't support a penalty in this case.

(Emphasis added.)

The circuit court interpreted Judge Martz's oral opinion to mean that he found as a fact that, Bert "firmly and personally believes in the correctness of his position." Based on that interpretation, the circuit court said that it was therefore inappropriate for the Comptroller to punish Bert for expressing his views.

As shown by the portion of Judge Martz's opinion quoted *supra* at pages 3-5, the Tax Court found that the requirements of 13-705(a)(2)(ii) were proven to his satisfaction. He specifically found that Bert's position had "no basis in law or fact, [was] patently unlawful and [did] not involve any legitimate dispute or reflect any inadvertent mathematical or clerical error." The circuit court disagreed in part saying that in his view the evidence showed the position Bert took did "involve a legitimate dispute."

We agree with the Tax Court and disagree with the circuit court. Some beliefs held by individuals are completely illogical though strongly embraced. It is therefore at least possible that Bert

believes his position is valid. But the mere fact that Bert is sincere in his belief does not mean that a $500.00 penalty should not have been imposed pursuant to section 13-705(a)(2)(ii).

The dispute between the parties was not legitimate and had no basis in "law of fact." *See* § 13-705(a)(2)(ii)(1 and 2). Bert's position was based, in its entirety, on the fact that he filed a false form 4852 that allowed him to make the claim to State and Federal tax collectors that his adjusted income for 2003 was zero. As the Court of Appeals said in *Winters* v. *State,* 301 Md. 214, 235 (1984), to advance such an argument is to engage in "pure sophistry." *See* Note 4, *supra.* Therefore, no legitimate dispute existed and the requirements of § 13-705(a)(2)(ii) were met.

Bert's Maryland tax return contained information that, on its face, "indicated[d] that the tax reported on the return [was] substantially incorrect." The return showed zero monies received from <u>any</u> source, yet on his substitute 4852 form, he said that the following monies had been withheld: 1) Federal Taxes: $12,136.77; 2) State taxes: $5,256.42; 3) Social Security Taxes: $4,822.30 and 4) Medicare Taxes: $1,127.80. Obviously, these taxes could not have been withheld if it was true that he received no income from any source in 2003. Thus all requirements of §13-705(a)(1)(ii) were also met.

For all the above reasons we hold that there was substantial evidence to support the Maryland Tax Court's decision upholding the imposition of a $500.00 penalty against Bert.

JUDGMENT ENTERED BY THE CIRCUIT COURT FOR HOWARD COUNTY REVERSED IN SO FAR AS THAT COURT FAILED TO UPHOLD THE $500.00 PENALTY IMPOSED FOR FILING A FRIVOLOUS TAX RETURN; JUDGMENT OTHERWISE AFFIRMED; CASE REMANDED TO THE CIRCUIT COURT FOR HOWARD COUNTY WITH INSTRUCTIONS TO FILE AN ORDER AFFIRMING IN ITS ENTIRETY THE JUDGMENT ENTERED BY THE MARYLAND TAX COURT; COSTS TO BE PAID BY COLVIN I. BERT.

[Date Stamp:
ENTERED
SEP 25 2007
CLERK, CIRCUIT COURT
HOWARD COUNTY]

COLVIN I. BERT	:	IN THE
Petitioner	:	CIRCUIT COURT
v.	:	FOR
COMPTROLLER OF THE TREASURY	:	HOWARD COUNTY
Respondent	:	CIVIL ACTION NO. 13-C-06-067541

ORDER

The matter is before the Court on the petition of Colvin 1. Bert for judicial review of an order of the Maryland Tax Court dated November 8, 2006 and rulings made by the Maryland Tax Court at the hearing held on October 18, 2006. The Court has reviewed the record of the proceedings held in the Tax Court and the memoranda of law filed in this Court. The Court has heard oral argument from the parties at a hearing held in this Court on September 18, 2007.

For the reasons stated by the Court, on the record, at the conclusion of the hearing held on September 18, 2007, it is

ORDERED that with respect to the Maryland Tax Court's affirmance of the Comptroller's assessment of a $500 frivolous return penalty

under Annotated Code of Maryland, Tax-General Article § 13-705, the petition for judicial review is GRANTED and the assessment of the $500 frivolous return penalty is REVERSED; and it is

FURTHER ORDERED that in all other respects, the petition for judicial review is DENIED and the judgment and other rulings of the Maryland Tax Court are AFFIRMED.

/S/ Richard S. Bernhardt

Judge

[Clerk Stamp:
TRUE COPY TEST
/S/
Margaret D. Rappaport]

COLVIN I. BERT	*	IN THE
	*	COURT OF APPEALS
	*	OF MARYLAND
v.	*	Petition Docket No. 638
		September Term, 2008
COMPTROLLER	*	(No. 2131, Sept. Term, 2007
OF THE TREASURY		Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert M. Bell

Chief Judge

DATE: April 10, 2009

COLVIN I. BERT	*	IN THE
	*	COURT OF APPEALS
	*	OF MARYLAND
v.	*	Petition Docket No. 638
		September Term, 2008
COMPTROLLER	*	(No. 2131, Sept. Term, 2007
OF THE TREASURY		Court of Special Appeals)

ORDER

The Court having considered the motion for reconsideration filed in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the motion for reconsideration be, and it is hereby, denied.

/s/ Robert M. Bell

Chief Judge

DATE: June 19, 2009

COLVIN I. BERT	*	IN THE
	*	
Vs.	*	MARYLAND TAX COURT
	*	
COMPTROLLER OF THE TREASURY	*	No. 06-IN-OO-0207
	*	

ORDER

The matter having come before the Court for a hearing on the merits, and all evidence having been received and considered and the parties having been heard, it is this *8th* day of *November*, 2006, by the Maryland Tax Court, for the findings of fact and conclusions of law as stated by the Court on the record at the conclusion of the hearing held on October 18, 2006

ORDERED that the assessment appealed from is AFFIRMED.

cc: Colvin I. Bert
Gerald Langbaum, Esq.

CERTIFIED TRUE COPY
TEST: Robert L. Zouck, Clerk

NOTICE: You have the right of appeal from the above Order to the Circuit Court of any County or Baltimore City,

wherein the property or subject of the assessment may be situated. The Petition for Judicial Review MUST be filed in the proper Court within thirty (30) days from the date of the above Order of the Maryland Tax Court. Please refer to Rule 7-200 et seq. of the Maryland Rules of Court, which can be found in most public libraries.

COLVIN I. BERT	:	IN THE
Petitioner	:	MARYLAND TAX COURT
v.	:	APPEAL NO. 06-IN-OO-0207
COMPTROLLER OF TREASURY	:	
Respondent	:	

: : : : : : : : : :

ORDER

Upon consideration of the motion to quash filed by the respondent Comptroller of the Treasury and Hearing Officer Debora Gorman, it is this 18 day of October, 2006

ORDERED that the motion to quash writ of summons is GRANTED; and it is

FURTHER ORDERED that the writ of summons heretofore issued to Debora Gorman is QUASHED.

/s/ Walter C. Martz
Judge

COLVIN I. BERT	*	IN THE
	*	
Vs.	*	MARYLAND TAX COURT
	*	
COMPTROLLER OF THE TREASURY	*	No. 06-IN-OO-0207
	*	

ORDER

A motion for Summary Judgment and Response thereto having been filed by the parties in the above entitled case, and the Court having read and considered said pleadings, it is this *29th* day of *August* 2006, by the Maryland Tax Court ORDERED, that the Petitioner's Motion for Summary Judgment be and the same is hereby DENIED.

/s/ Walter C. Martz
Judge

COMPTROLLER
of Maryland
Serving the People

William Donald Schafer
Comptroller
James T. Loftus
Director
Compliance Division

NOTICE OF FINAL DETERMINATION

READ THIS NOTICE WITH CARE:
YOU MUST ACT WITHIN 30 DAYS OF THIS NOTICE TO PRESERVE FURTHER APPEAL RIGHTS.

Colvin I. Bert
P.O. Box 1242
Ellicott City, MD 21041

TIN: XXX-XX-1826
Tracking No: 52667
Tax Year: 2003
Date: April 11, 2006

Refund Amount Requested:	$(5,256.42)
Refund Amount Approved:	$(25.63)
Refund Amount Denied:	$(5,230.79)

	Original Assessment Amount	Final Assessment Amount
Refund Approved	$(25.63)	$(25.63)
Penalty	$ 500.00	$500.00
Total	$ 474.37	$474.37

Fax: 410-333-7745 Toll Free: 1-888-615-0268

This is the Comptroller's final determination on your request for revision of the partial denial of refund claim and the above-referenced income tax assessment, issued on January 22, 2005, pursuant to Tax-General Article, Sections 13-508 (c) and 13-904 of the Annotated Code of Maryland.

On February 22, 2006, an informal hearing was held regarding the partial denial of the taxpayer's requested refund and the above-referenced assessment. At issue are whether wages reported on a W-2 are taxable income and whether the frivolous return penalty was appropriately assessed.

Rita Bormuth, of the Compliance Division, appeared on behalf of the Comptroller of Maryland. She testified that Mr. Bert filed a 2003 Maryland return dated October 7, 2005. That return reported income in the amount of $0.00, and requested a refund of his withholding in the amount of $5,256.42. Ms. Bormuth stated that she recomputed the return to include the wages reported by Data Computer Corporation in the amount of $77,779.00. Based on that income, Ms. Bormuth determined that the total Maryland and local tax due was $5,230.79, which after applying the withholding, left a refund of $25.63. Ms. Bormuth assessed a $500.00 frivolous return penalty, which brought the total due to $474.37. An assessment was issued in that amount on October 20, 2005, and the Taxpayer made a timely appeal of that assessment.

Mr. Colvin Bert appeared on his own behalf at the hearing. Mr. Bert questioned Ms. Bormuth's authority to issue the assessment, and consequently, the legality of the assessment he received. He presented a Memorandum dated September 24, 2004 from Barbara Esker to Ronald LaMartina which gives a

general job description and specific duties performed by Rita Bormuth, and questioned whether issuing an assessment was within the scope of her employment in view of that job description. Mr. Bert's position is that because Ms. Bormuth's job description does not specifically list assessing tax or penalty as one of the duties of her position, Ms. Bormuth acted outside the scope of her authority in issuing this assessment, therefore rendering the assessment illegal.

Mr. Bert presented documents verifying his right to appeal the assessment under Tax-General Article §13-508, as well as the partial denial of the refund amount claimed on his return, pursuant to Tax-General Article § 13-904. Mr. Bert questioned why his return was deemed frivolous; Mr. Bert stated that he felt his Maryland return was filed in accordance with applicable Maryland law. As directed by Tax-General Article §10-204, he reported federal adjusted gross income on his Maryland return of $0.00 because that is the amount he calculated on his federal return for adjusted gross income.

Mr. Bert feels that his return was not frivolous, and that he has provided all the support available to him to show that his return was filed in accordance with applicable law. Specifically, Mr. Bert provided a copy of his federal return showing $0.00 in adjusted gross income, as well as a substitute W2. Mr. Bert testified that it is his position that his employer misrepresented the amount of his income that is taxable on the original W2 statement.

The Internal Revenue Service has proposed changes to Mr. Bert's 2003 federal return; however, Mr. Bert disagreed with the suggested changes. As of the date of this appeal hearing, Mr. Bert had not

been notified of any changes made to his 2003 return by the Internal Revenue Service. A federal account transcript for tax year 2003 dated November 18, 2005 was provided. That transcript showed tax per return and taxed assessed as $0.00. Subsequent correspondence from the Internal Revenue Service indicates that the return is being examined to determine the correct amount of tax due. Short of any adjustment by the Internal Revenue Service, Mr. Bert asserts that the federal adjusted gross income reported on his Maryland return ($0.00) is correct.

The hearing officer inquired of Ms. Bormuth why a frivolous return penalty was issued in this case. Her response was that Mr. Bert's 2003 return indicated $0.00 income and requested a refund of his withholding, and that the substitute W2 showing $0.00 wages was attached to the return. However, Ms. Bormuth stated the Taxpayer had wages of $77,779.00 from Data Computer Corporation. Therefore, she felt there was no basis for the amounts filed on the Maryland return. Mr. Bert responded that he feels the wage information reported by Data Computer Corporation was incorrect based on "Company provided records and the statutory language behind IRC sections 3401 and 3121 and others." Mr. Bert stated that he is a quality support manager at Data Computer Corporation. He acknowledges that the amounts listed as withheld on the W2 are correct. Mr. Bert argued his wages are not subject to taxation under the Internal Revenue Code because §§3401 and 3121 limit taxable income to wages received by federal employees, which Mr. Bert is not.

Mr. Bert also presented documentation obtained from the internet showing that other taxpayers with a

similar situation to his were refunded their withholding by the Internal Revenue Service. Mr. Bert did not know the individuals listed in the documents personally, nor could he provide independent verification of the documents printed from the internet.

Pursuant to Tax-General Article §10-102, a tax is imposed on the Maryland taxable income of each individual. "Maryland taxable income" is defined at Tax-General Article §10-101(f) for an individual as "Maryland adjusted gross income, less the exemptions and deductions allowed under this Title." Tax-General Article §10-203 provides that "the Maryland adjusted gross income of an individual is the individual's federal adjusted gross income for the taxable year as adjusted under this Part II of this subtitle."

"Gross income" is defined in Internal Revenue Code (IRC) §61(a) as "... all income from whatever source derived, including (but not limited to) ... [c]ompensation for services." IRC §3401(a) defines the term "wages" as "... all remuneration (other than fees paid to a public official) for services performed by an employee for his employer ..." Moreover, the courts have consistently found that wages are included in gross income. See *Olson v. United States,* 760 F.2d 1003 (9th Cir. 1985); *Coleman v. Commissioner,* 791 F.2d 68 (7th Cir. 1986); *Carter v. Commissioner,* 784 F.2d 1006 (9th Cir. 1986).

Mr. Bert was compensated, in the form of wages, for the services he performed for Data Computer Corporation, and those wages are income. The Taxpayer has not met his burden of proving that his wages are not subject to federal and state income tax. Accordingly, I find that th

adjustment to Mr. Bert's return resulting in tax of $5,230.79 and the denial of that portion of his claimed refund was correct.

Mr. Bert's complaint challenging Ms. Bormuth's authority to issue the assessment, including the frivolous penalty, is without merit. The September 28, 2004 Memorandum provided by Mr. Bert begins with the following summary of Ms. Bormuth's position: "The main purpose of this position is to audit questionable individual income tax returns to determine if the information on the return is correct and to adjust the returns when necessary based on the audit findings."

The Annotated Code of Maryland Tax-General Article §101(e) defines the term "Comptroller":

> (e) *Comptroller.* –
>
> (1) "Comptroller" means the Comptroller of the State.
>
> (2) "Comptroller", unless expressly provided otherwise, includes: (i) an employee of the Comptroller acting within the scope of employment.

Tax-General Article §13-101 defines the term "Tax collector":

> (c) *Tax collector.* –
>
> (1) "Tax collector" means the person or governmental unit responsible for collecting a tax.
>
> (2) "Tax collector" includes: (i) the Comptroller.

Tax-General Article §13-401(a) provides the basis for the assessment when a return is filed:

> (a) *In general.* – Except as provided in Subsection (b) of this section, if a tax collector examines or audits a return and determines that the tax due exceeds the amount shown on the return, the tax collector shall assess the deficiency.

Tax-General Article §13-705(a) states the basis for assessing a frivolous penalty:

> (a) *Penalty.* – The Comptroller shall assess a penalty not exceeding $500 if:
>
> (1) An individual, as defined under §10-101 of this article, files what purports to be an income tax return, but which:
>
> (i) does not contain information on which the substantial correctness of the tax may be determined; or
>
> (ii) contains information that, on its face, indicates the tax reported on the return is substantially incorrect; and
>
> (2) the conduct of the individual is due to :
>
> (i) a desire, apparent on the face of the return, to delay or impede the administration of the provisions of Title 10; or
>
> (ii) a position that is frivolous because the position:
>
> 1. has no basis in law or fact;
> 2. is patently unlawful; and
> 3. does not involve a legitimate dispute or reflect an inadvertent mathematical or clerical error

A tax collector who in the course of examination or audit of a return finds a deficiency is required by §13-401(a) to assess the deficiency. The language is unequivocal. Therefore, Ms. Bormuth, like any employee of the Comptroller who examines and audits returns, is required by the statute to assess a deficiency when she finds one. Being statutorily mandated, there is no question that issuing an assessment after finding a deficiency was within the scope of her employment. As an employee of the Comptroller acting within the scope of her employment, I find that the deficiency discovered by Ms. Bormuth was lawfully assessed. Likewise, the language of §13-705, "shall assess a penalty," is language of requirement. Based upon the findings of her investigation, Ms. Bormuth was compelled to assess the frivolous penalty. Accordingly, I reject Mr. Bert's claim that the assessment was issued unlawfully. Based on the evidence presented, I agree that the 2003 return filed by Mr. Bert contains information that, on its face, indicated the tax reported is incorrect, and that this position is frivolous because it has no basis in law or fact, is patently unlawful, and does not involve a legitimate dispute or reflect an inadvertent mathematical or clerical error.

Accordingly, the partial denial of refund claimed by the taxpayer and the assessment of the frivolous return penalty are affirmed in the amounts stated above.

If you are dissatisfied with this final determination, AN APPEAL MUST BE TIMELY FILED IN THE MARYLAND TAX COURT within 30 days of the date shown above. DO NOT FILE AN APPEAL WITH THE COMPTROLLER OF THE TREASURY. If you do not appeal in accordance with the procedures of the MARYLAND TAX COURT within 30 days, this final determination will become absolute and may not be

appealed for any reason. Appropriate forms for use in filing appeals may be obtained from the MARYLAND TAX COURT at 301 West Preston Street, Suite 1513, Baltimore, Maryland 21201, telephone number (410) 767-4830.

/s/ Debora Gorman, Esquire

Hearing Officer
410-767-1827

COMPTROLLER *of* Maryland
Serving the People

William Donald Schafer
Comptroller

James T. Loftus
Director
Compliance Division

October 20, 2005

Mr. Colvin Bert
P.O. Box 1242
Ellicott City, MD 21041

Re: SSN: 200-42-1826

Dear Mr. Bert:

You have submitted a Maryland income tax return for 2003 and have indicated that wages are not income subject to taxation.

This is to advise you that courts have consistently held that wages are taxable income. Accordingly, your return has been adjusted to include the income. Also, after making the appropriate calculations, the following assessment Is made pursuant to Sections 13-705 of the Tax-General Article of the Annotated Code of Mary/and:

Corrected Refund	$ 25.63
Penalty	$500.00 (Frivolous Return)

Total Due $474.37

If you disagree with this assessment, you may file an appeal in writing to the Compliance Division, Hearings and Appeals Section, 301 West Preston Street, Baltimore, MD 21201 within (30) thirty days of the date of this notice. If you do not file an 'appeal within the time allowed, this assessment shall be final, and penalty shall be collected by attaching your wages, property or both.

Sincerely,

/s/Rita Bormuth
Compliance Programs Section
Tax Investigation Unit
(410) 767-1943

RB

301 West Preston Street · Baltimore, Maryland 21201-2383

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION FIFTH AMENDMENT.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION FOURTEENTH AMENDMENT § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE 26 U.S.C. § 6702. Frivolous tax submissions.

(a) Civil penalty for frivolous tax returns

A person shall pay a penalty of $5,000 if—

(1) such person files what purports to be a return of a tax imposed by this title but which—

(A) does not contain information on which the substantial correctness of the self-assessment may be judged, or

(B) contains information that on its face indicates that the self-assessment is substantially incorrect, and

(2) the conduct referred to in paragraph (1)—

(A) is based on a position which the Secretary has identified as frivolous under subsection (c), or

(B) reflects a desire to delay or impede the administration of Federal tax laws.

(b) Civil penalty for specified frivolous submissions

(1) Imposition of penalty

Except as provided in paragraph (3), any person who submits a specified frivolous submission shall pay a penalty of $5,000.

(2) Specified frivolous submission

For purposes of this section—

(A) Specified frivolous submission

The term "specified frivolous submission" means a specified submission if any portion of such submission—

(i) is based on a position which the Secretary has identified as frivolous under subsection (c), or

(ii) reflects a desire to delay or impede the administration of Federal tax laws.

(B) Specified submission

The term "specified submission" means—

(i) a request for a hearing under—

(I) section 6320 (relating to notice and opportunity for hearing upon filing of notice of lien), or

(II) section 6330 (relating to notice and opportunity for hearing before levy), and

(ii) an application under—

(I) section 6159 (relating to agreements for payment of tax liability in installments),

(II) section 7122 (relating to compromises), or

(III) section 7811 (relating to taxpayer assistance orders).

(3) Opportunity to withdraw submission

If the Secretary provides a person with notice that a submission is a specified frivolous submission and such person withdraws such submission within 30 days after such notice,

the penalty imposed under paragraph (1) shall not apply with respect to such submission.

(c) **Listing of frivolous positions**

The Secretary shall prescribe (and periodically revise) a list of positions which the Secretary has identified as being frivolous for purposes of this subsection. The Secretary shall not include in such list any position that the Secretary determines meets the requirement of section 6662 (d)(2)(B)(ii)(II).

(d) **Reduction of penalty**

The Secretary may reduce the amount of any penalty imposed under this section if the Secretary determines that such reduction would promote compliance with and administration of the Federal tax laws.

(e) **Penalties in addition to other penalties**

The penalties imposed by this section shall be in addition to any other penalty provided by law.

TITLE 26 U.S.C. § 6703. **Rules applicable to penalties under sections 6700, 6701, and 6702.**

(a) **Burden of proof**

In any proceeding involving the issue of whether or not any person is liable for a penalty under section 6700, 6701, or 6702, the burden of proof with respect to such issue shall be on the Secretary.

MD. CODE TAX-GENERAL ARTICLE § 13-705. **Frivolous income tax return.**

(a) *Penalty.* – The Comptroller shall assess a penalty not exceeding $500 if: (1) an

individual, as defined under § 10-101 of this article, files what purports to be an income tax return, but which:

(i) does not contain information on which the substantial correctness of the tax may be determined; or

(ii) contains information that, on its face, indicates the tax reported on the return is substantially incorrect; and

(2) the conduct of the individual is due to:

(i) a desire, apparent on the face of the return, to delay or impede the administration of the provisions of Title 10; or

(ii) a position that is frivolous because the position:

1. has no basis in law or fact;
2. is patently unlawful; and
3. does not involve a legitimate dispute or reflect an inadvertent mathematical or clerical error.

(b) *Additional to other penalty.* — The penalty under subsection (a) of this section is in addition to any penalty assessed under § 13-701 of this subtitle.

MD. CODE TAX-GENERAL ARTICLE §10-107. Application of federal income tax law.

To the extent practicable, the Comptroller shall apply the administrative and judicial interpretations of the federal income tax law to the administration of the income tax of this state.

MD. CODE TAX-GENERAL ARTICLE § 10-203. In general.

Except as provided in Subtitle 4 of this title, the Maryland adjusted gross income of an individual is the individual's federal adjusted gross income for the taxable year as adjusted under this Part II of this subtitle.

MD. CODE TAX-GENERAL ARTICLE § 10-804. Requirements generally.

(a) *Filing.* – Each person required under this subtitle to file an income tax return or estimated income tax declaration or return shall file a return or declaration with the Comptroller, · (b) *Oaths and signature.* –(1) Each income tax return and estimated income tax declaration and return shall be: (i) signed in the same manner required for the signing of a federal return under §§ 6061 through 6064 of the Internal Revenue Code; and (ii) made under oath.

(e) *Other requirements.* · Each person required under this subtitle to file an income tax return or estimated income tax declaration or return shall: (1) comply

with the regulations of the Comptroller; (2) keep the records that the Comptroller requires; and (3) attach to an income tax return or otherwise file with the Comptroller any records or statements that the Comptroller requires, including: (i) for an individual who has income tax withheld from salary, wages or other compensation for personal services, or other payments, a copy of the statement from the person who withholds the tax that states: (1) the amount of salary, wages, or other compensation for personal services paid and the income tax withheld; or 2. The amount of payments made and the income tax withheld; (ii) a copy of the federal income tax return;

MD. CODE TAX-GENERAL ARTICLE § 13-701. When return not filed or tax not paid.

(b) *In general.* – Except as otherwise provided in this subtitle, if a person or governmental unit fails to pay a tax when due under this article, the tax collector shall assess a penalty not exceeding 10% of the unpaid tax.

Title 26 U.S.C. § 911 (a) Citizens or residents of the United States living abroad

Title 26 U.S.C. § 3121 Definitions

Title 26 U.S.C. § 3401 Definitions

Title 26 U.S.C. § 6065 Verification of returns

Title 26 U.S.C. § 7201 Attempt to evade or defeat tax

Title 26 U.S.C. § 7203 Willful failure to file return, supply information, or pay tax

Title 26 U.S.C. § 7206 Fraud and false statements

Title 26 U.S.C. § 7207 Fraudulent returns, statements, or other documents

Title 26 U.S.C. § 7872 Treatment of loans with below-market interest rates

26 C.F.R. § 1.6065-1(a) Verification of returns

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TG § 10-805 Individual returns – Residents

TG § 13-101 (c) Definitions

TG § 13-401 Assessment when tax return filed

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TG § 13-703 False returns

TG § 13-706 Failure to provide or providing false income tax withholding statement

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TG § 13-1001 Willful failure to file return

TG § 13-1002 Willfully filing false return

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No. 09-295

IN THE
Supreme Court of the United States

Colvin I. Bert
Petitioner

v.

Comptroller of the Treasury of Maryland
Respondent

On Petition of Writ of Certiorari
To Maryland Court of Appeals

PETITION FOR REHEARING

Colvin I. Bert, Pro Se
Post Office Box 1242
Ellicott City, Maryland 21041
410-312-7866

STATEMENT PURSUANT TO RULE 29.6

See Brief for Petitioner at p. ii.

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PETITION FOR REHEARING

Pursuant to Rule 44.1, petitioner respectfully petitions this Court for rehearing.

I.
Comptroller Routinely Disregards Federal/State Tax Laws

The Comptroller's failure to follow the federal and state tax laws has made the tax compliance scheme in MD unconstitutional. This disregard of the tax laws by the Comptroller of Maryland (Comptroller) promotes an environment of fear and extortion; and if the Court does not intervene the Comptroller will continue to execute his office as if he is the King of England and above the law in every respect.

The Comptroller routinely and systematically fails to give persons proper notice, denies persons a hearing to dispute tax collector evidence, denies persons a formal hearing required by law, and denies persons a proper de novo hearing in Tax Court.

The Comptroller 'appears' to provide persons proper notice and a hearing with the opportunity to be heard. However, a closer analysis will clearly show that the notices issued by the Comptroller fail to meet the requirements of MD State Government Article (SG) § 10-207; and the hearing provided by the Comptroller is not a proceeding where the Comptroller places evidence on the record to use in

adjucating the contested case pursuant to MD SG §10-213 (a)[1].

Instead, the Comptroller's tax compliance scheme is designed to hinder and limit contested tax cases; and the common person would find it difficult to navigate this erroneous, bias and deceptive administrative appeal process.

State income tax collection is big business and any person threatening this enterprise is treated like a terrorist and labeled a protestor. However, the petitioner is neither a terrorist nor a protestor. The petitioner is actually a tax law proponent. The petitioner files returns based on the tax laws and demands the Comptroller dispute any tax return filed by the petitioner pursuant to the law.

In contrast the Comptroller's tax compliance scheme demands that persons do what the Comptroller says and not what the federal and state tax laws require. Subsequently, when a person does not do what the Comptroller wants that person is subjected to unfair and bias appeal hearings and illegal levy and garnishment action without due process. Even MD lawyers and judges are afraid of the tax collector.

The petitioner in the case before the Court has been subjected to bank levy, wage garnishment, dismissal of appeals and unfair, bias proceedings at the administrative and judicial levels. These actions

---

[1] SG §10-213. Evidence. (a) *In general.* - (1) Each party in a contested case shall offer all of the evidence that the party wishes to have made part of the record. (2) If the agency has any evidence that the agency wishes to use in adjudicating the contested case, the agency shall make the evidence part of the record.

have been taken against the petitioner by the Comptroller because the petitioner demands that the Comptroller follow the tax laws.

It is unconstitutional for the Comptroller to demand persons file a Maryland state tax return under the penalty of perjury; but refuse to consider the person's filed tax return when determining the person's tax liability. This is a blatant denial of a person's due process rights.

If failing to file a tax return is a criminal act punishable by prison time; then a person filing a valid tax return should be provided equal rights under the law. Therefore, the accusation of a false return is a serious offense and the administrative and judicial process necessary to prove such an offense should not be ignored and treated lightly by government employees.

The Court stated in *County of Sacramento v. Lewis,* 98 F.3d 434 (1998), reversed, that:

> Our prior cases have held the provision that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law," U.S. Const., Amdt. 14, §1, to "guarante[e] more than fair process," *Washington* v. *Glucksberg,* 521 U.S. ___, ___ (1997) (slip op., at 15), and to cover a substantive sphere as well, "barring certain government actions regardless of the fairness of the procedures used to implement them," *Daniels* v. *Williams,* 474 U.S. 327, 331 (1986); see also *Zinermon* v. *Burch,* 494 U.S. 113, 125 (1990) (noting that substantive due process violations are actionable under §1983). The

allegation here that Lewis was deprived of his right to life in violation of substantive due process amounts to a such claim, that under the circumstances described earlier, Smith's actions in causing Lewis's death were an abuse of executive power so clearly unjustified by any legitimate objective of law enforcement as to be barred by the Fourteenth Amendment. Cf. *Collins* v. *Harker Heights,* 503 U.S. 115, 126 (1992) (noting that the Due Process Clause was intended to prevent government officials " 'from abusing [their] power, or employing it as an instrument of oppression' ") (quoting *DeShaney* v. *Winnebago County Dept. of Social Servs.,* 489 U.S. 189, 196 (1989) (quoting *Davidson* v. *Cannon,* 474 U.S. 344 (1986)).

Since the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action:

"The principal and true meaning of the phrase has never been more tersely or accurately stated than by Mr. Justice Johnson, in *Bank of Columbia* v. *Okely,* 4 Wheat. 235—244 [(1819)]: 'As to the words from Magna Charta, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the

powers of government, unrestrained by the established principles of private right and distributive justice.' " *Hurtado* v. *California,* 110 U.S. 516, 527 (1884).

We have emphasized time and again that "[t]he touchstone of due process is protection of the individual against arbitrary action of government," *Wolff* v. *McDonnell,* 418 U.S. 539, 558 (1974), whether the fault lies in a denial of fundamental procedural fairness, see, *e.g.*, *Fuentes* v. *Shevin,* 407 U.S. 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against "arbitrary takings"), or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective, see, *e.g.*, *Daniels* v. *Williams*, 474 U.S., at 331 (the substantive due process guarantee protects against government power arbitrarily and oppressively exercised). While due process protection in the substantive sense limits what the government may do in both its legislative, see, *e.g.*, *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), and its executive capacities, see, *e.g.*, *Rochin* v. *California,* 342 U.S. 165 (1952), criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue.

In the instant case it is the arbitrary, unlawful and oppressive actions of the Comptroller that are at issue and the Court's review of this

matter is needed because the Comptroller is terrorizing Maryland citizens and businesses.

II
MD Tax Compliance Scheme Flawed

Whether it is intentionally, erroneously or by design the MD States Attorney, the MD Tax Court and the MD justice system supports the Comptroller's tax compliance scheme. Therefore, any erroneous or fraudulent actions by the Comptroller are often ignored by the States Attorney and the courts.

Subsequently, a person who contest a tax liability determined by the Comptroller and appeals the decision to the MD Tax Court will find themselves at odds with four branches of government; the Comptroller's Office, States Attorney's Office, MD Tax Court and the judicial branch of government.

Sadly, any appeals that reach the Tax Court or beyond will often result in legal fees (if an attorney is retained) that far exceed the contested tax. Hence, it is financially better to just pay the contested tax versus fighting the tax assessment in court. This is denial of due process by excessive costs and burden.

This Court stated in *Kraft Gen. Foods v. Iowa Dept. of Revenue & Finance*, 505 U.S. 71 (1992):

> The burden on one making a facial challenge to the constitutionality of a statute is heavy; the litigant must show that "no set of circumstances exists under which the Act would be valid."

This is the case when the Comptroller fails to provide a person proper notice or utilizes the frivolous return penalty to assess persons additional taxes. In both cases, the Comptroller fails to provide the person due process. On the one hand the Comptroller fails to identify the issue that has resulted in the tax liability increase and on the other hand the Comptroller disregards the person's best evidence to substantiate their tax liability, which is their tax return.

In the instant case the Comptroller cited statutes that he did not correctly apply. However, the Comptroller now fails to identify any statutes of authority and action required by law. Recent assessments received by petitioner dated October 22, 2009 (A1 – A6.) are perfect examples of notices issued by the Comptroller that failed to meet the requirements of SG § 10-207.

The Court should note that neither Notice of Income Tax Assessment (A1 – A6) issued by the Comptroller stated concisely and simply the facts that are asserted; or if the facts cannot be stated in detail – the issues that are involved. The notices failed to state the pertinent statutory and regulatory sections under which the agency is taking its action and does not state the sanction proposed or the specific legal penalty, if any, as a result of the agency's action.

Therefore, it is impossible for a person to know what the facts and issues are that have resulted in a change to their tax liability if the Comptroller does not provide that information in the Notice of Income Tax Assessment. Subsequently, as

in the instant case, the petitioner is being pressured to appeal a decision that is vague, not specific or informative (i.e., what is the exact penalty).

Subsequently, when a person appeals a Notice of Income Tax Assessment and attends the scheduled hearing the Comptroller employee responsible for the assessment fails to present any evidence to substantiate their assessment. In addition, the person appealing the assessment is denied the opportunity to dispute the basis of the assessment. Instead, the petitioner is forced to substantiate the entries on their tax return in the blind (i.e., without the knowledge of what is legally wrong with his return according to the Comptroller).

The Comptroller's hearing officer issues a written final determination at the conclusion of the hearing and the petitioner can appeal this decision with the MD Tax Court. However, the Comptroller routinely fails to provide a record of the proceeding from which an appeal is taken pursuant to TG § 13-520, which states:

> **TG § 13-520. Subpoenas for hearings.**
>
> (a) *On filing of petition.* – On receipt of a petition, the clerk of the Tax Court immediately shall issue a subpoena that requires the appropriate tax determining agency to produce at a hearing before the Tax Court:
>
> (1) The record of the proceeding from which the appeal is taken or a certified copy of the record; and
>
> (2) Any map, plat, or other document that is connected with the record.

Hence, instead of the de novo hearing conducted at Tax Court being a fresh look at the record from the preceeding hearing and the final determination issued by the Comptroller's hearing officer, the Tax Court hearing is erroneously conducted as a totally new proceeding with no previous record and the petitioner is denied any opportunity to dispute the final determination issued by the Comptroller's hearing officer. This is a blatant denial of due process.

Subsequently, the Tax Court issues an order that does not specify the findings of fact or the conclusions of law determined at the Tax Court hearing as required by law; another denial of due process.

Unbelievably, the Circuit Court also fails to issue an order specifying the findings of fact or the conclusions of law determined at the Circuit Court hearing.

Finally, the CSA and the Comptroller invoke the criminal offense statute TG § 13-1002 when they claim petitioner filed a false form 4852 or allege the same circumstances as *Winters v. State,* wherein Winters was indicted on criminal tax offenses. However, as the Court knows, petitioner has never been charged with a criminal tax violation or the civil penalty of filing a false return (TG § 13-703).

The Court in *Buckley v. Valeo,* 424 U.S. 1 (1976) stated:

> Due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal, for "no man shall be held criminally responsible for conduct which he

could not reasonably understand to be proscribed." *United States v. Harriss,* 347 U.S. 612, 617 (1954). *See also Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972).

The petitioner has never received from the Comptroller in the instant case a notice that charges him with a criminal tax violation. This is another denial of due process.

The Court in *Thornhill v. Alabama,* 310 U.S. 88 (1940) stated:

> "Conviction upon a charge not made would be sheer denial of due process." *De Jonge v. Oregon,* 299 U.S. 353, 362 < The practice of substituting for the evidence a stipulation of facts not shown to have received the approval of the court below is disapproved. P. 358>; *Stromberg v. California,* 283 U.S. 359, 367-368.

The Md Court of Special Appeals did exactly what the Court in *Thornhill warned* of when it determined that petitioner "filed a false form 4852 that allowed him to make the claim to State and Federal tax collectors that his adjusted income for 2003 was zero." No court below had approved the stipulation of that alleged fact.

In addition, the Court in *Paul v. Davis,* 424 U.S. 693 (1976) stated:

> The Due Process Clause also forbids arbitrary deprivations of liberty. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," the minimal requirements of the Clause must be satisfied.

Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971); *Board of Regents v. Roth, supra* at 573. School authorities here suspended appellees from school for periods of up to 10 days based on charges of misconduct. If sustained and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers, as well as interfere with later opportunities for higher education and employment. It is apparent that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution.

Obviously, an unsubstantiated claim of fraud by the CSA could seriously damage the petitioner's reputation, opportunities for employment and many other personal life goals.

CONCLUSION

The Maryland Declaration of Rights, Article VI, states:

> That all persons invested with the Legislative or Executive powers of Government are the Trustees of the Public, and, as such, accountable for their conduct: Wherefore, whenever the ends of Government are perverted, and public liberty manifestly

> endangered, and all other means of redress are ineffectual, the People may, and of right ought, to reform the old, or establish a new Government; the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish and destructive of the good and happiness of mankind.

The Comptroller's actions in the instant case are erroneous and unconstitutional, and public liberty is manifestlty endangered by the taking of property without due process.

Therefore, the petitioner believes it his public duty to fight unconstitutional actions by the Comptroller through, initially, the judicial process, and if necessary by informing the citizens of Maryland about the egregious acts of the Comptroller. In addition, the Comptroller should be removed from office if he repeatedly fails to follow the federal and state tax laws.

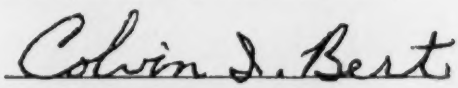
The petitioner has attained a B.S. in Electrical Engineering from Drexel University; has been certified as a Certified Quality Auditor and a Certified Software Quality Engineer by the American Society for Quality; and has been a technical government auditor at NASA and the Centers for Medicare and Medicaid Services (CMS) for over 20 years. Therefore, the petitioner is intelligent enough to understand the administrative procedures for contested cases and the applicable laws and statutes at issue. Hence, the petitioner has successfully filed twenty (20) appeals of Comptroller actions in the last four years.

In addition, the petitioner is currently appealling two other questionable actions by the Comptroller; and if the Court does not act those cases will also be before the Court.

Finally, the petitioner ask the Court to determine why does the Comptroller and the MD justice system routinely and intentionally circumvent and misapply the tax statutes of both the U.S. and the state of MD in tax cases by denying state citizens their constituional Fifth and Fourteenth Amendment rights and their due process procedural rights set forth in the statutes themselves?

For the forgoing reasons, petitioner respectfully requests the Court to grant his petition for rehearing.

Respectfully Submitted,

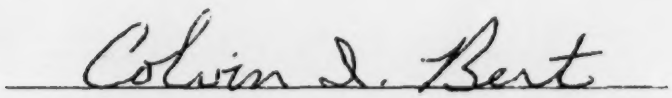


Colvin I. Bert, Pro Se
P.O. Box 1242
Ellicott City, MD 21041
410-312-7866

November 9, 2009

CERTIFICATE OF PARTY UNREPRESENTED BY COUNSEL

I hereby certify that this petition for rehearing is restricted to the grounds specified in paragraph 2 of Rule 44 and it is presented in good faith and not for delay.



Colvin I. Bert

COMPTROLLER NOTICE ID: N0000201/07/138
***of* Maryland**
Serving the People

NOTICE OF INCOME TAX ASSESSMENT

Colvin I. Bert October 22, 2009
P.O. Box 1242
Ellicott City, MD 21041 Notice No .1438242091022

This is your Notice of Income Tax Assessment required by law. This notice reflects the penalty and accrued interest to date and is required even if a payment plan has been established. If a plan is in effect, continue to follow the terms of the agreement. If you disagree with this assessment, you may, within 30 days from the date of this notice, register an appeal online with the **Compliance Division** at **http://compnet.comp.state.md.us** or in writing to the Compliance Division, Hearings and Appeals section, 301 West Preston Street, Room 315, Baltimore, Maryland 21201 or by e-mail to cdhearings@comp.state.md.us.

ACCOUNT YEAR .... 2005 INTEREST ..$3,008.66
TAX LIABILITY $6,452.80 PENALTY $645.28
BALANCE DUE $10,106.74

Unless full payment or a request for a hearing is received within thirty days, we will begin collection actions. Please use the coupon below when remitting your payment. To pay by credit card, contact Official Payments Corp. at 1-800-2PAYTAX or on their

website at www.officialpayments.com. **If you need additional time to pay,** you may be eligible for an extended payment plan up to 24 months by visiting the **Compliance Division** website at https://interactive.marylandtaxes.com/extranet/compliance/payagr/ where, for your convenience, your monthly payments can be deducted directly from your checking account. For a payment plan than is 12 months or less, visit our website or send as much as possible now, circle one the options below and **return this entire notice with your payment. Interest accrues at 13% per annum during the payment period.** If you need assisstance please call 410-974-2432 or 1-888-674-0016.

I request a payment plan for: 3 Months 6 Months 9 Months 12 Months Amount enclosed: _____

Phone Numbers: Daytime_____ Evening_____

The Maryland Legislature has approved a Tax Amnesty program starting September 1st and ending October 30th.

To see if you are eligible for Amnesty check the internet at www.marylandtaxes.com.

FOR THE HEARING IMPAIRED: Maryland Relay Service 711 or TDD 410-260-7157

Please tear at performation and return this portion with your payment or letter so it can be identified properly. Make checks payable to COMPTROLLER OF MARYLAND. DO NOT SEND CASH. Please write your identification number (SSN, CR or FEIN)

on your check. Be sure the return address shows through the window on the enclosed envelope. Make any name or address changes below.

State of Maryland
Comptroller of Maryland

1438242091022 10 106 74 Notice No 1438242091022
[_____] [_____] Personal Income Tax
NOTICE NO. BALANCE
DUE

COLVIN I BERT
PO BOX 1242
ELLICOTT CITY MD
21041-1242

COMPTROLLER OF MARYLAND
REVENUE ADMINISTRATION DIVISION
ANNAPOLIS, MD 21411

10/22/2009

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ACCOUNT YEAR .... 2005 INTEREST .....$.00
TAX LIABILITY ..... $.00 PENALTY $500.00
BALANCE DUE ...$500.00

Unless full payment or a request for a hearing is received within thirty days, we will begin collection actions. Please use the coupon below when remitting your payment. To pay by credit card, contact Official Payments Corp. at 1-800-2PAYTAX or on their

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State of Maryland
Comptroller of Maryland

1438241091022 500 00 Notice No 1438241091022
[_____] [_____] Personal Income Tax
NOTICE NO. BALANCE
DUE

COLVIN I BERT
PO BOX 1242
ELLICOTT CITY MD
21041-1242

COMPTROLLER OF MARYLAND
REVENUE ADMINISTRATION DIVISION
ANNAPOLIS, MD 21411

10/22/2009

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION FIFTH AMENDMENT.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION FOURTEENTH AMENDMENT § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE 42 U.S.C. § 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or ommision taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

MD. CODE STATE GOVERNMENT ARTICLE (SG) § 10-207. Notice of agency action.

(a) *In general.* - An agency shall give reasonable notice of the agency's action.

(b) *Contents of notice.* - The notice shall

(1) state concisely and simply:

(i) the facts that are asserted; or

(ii) if the facts cannot be stated in detail when the notice is given, the issues that are involved;

(2) state the pertinent statutory and regulatory sections under which the agency is taking its action;

(3) state the sanction proposed or the potential penalty, if any, as a result of the agency's action;

(4) unless a hearing is automatically scheduled, state that the recipient of notice of an agency's action may have an opportunity to request a hearing, including:

(i) what, if anything, a person must do to receive a hearing; and

(ii) all relevant time requirements; and

(5) state the direct consequences, sanction, potential penalty, if any, or remedy of the recipient's failure to exercise in a timely manner the opportunity for a hearing or to appear for a scheduled hearing.

(c) *Consolidation of notices.* - The notice of agency action under this section may be consolidated with the notice of hearing required under § 10-208 of this subtitle.

(d) *Publication in Register.* - For purposes of this section, publication in the Maryland Register does not constitute reasonable notice to a party.

[An. Code 1957, art. 41, § 251; 1984, ch. 284, § 1; 1989, ch. 239; 1993, ch. 59, § 1.]

SG §10-208. Notice of Hearing.

(a) *In general.* – An agency or the Office shall give all parties in a contested case reasonable written notice of the hearing.

(b) *Contents of notice.* - The notice shall state:

(1) the date, time, place, and nature of the hearing;

(2) the right to call witnesses and submit documents or other evidence under § 10-213(f) of this subtitle;
(3) any applicable right to request subpoenas for witnesses and evidence and specify the costs, if any, associated with such a request;
(4) that a copy of the hearing procedure is available on request and specify the costs associated with such a request;
(5) any right or restriction pertaining to representation;
(6) that failure to appear for the scheduled hearing may result in an adverse action against the party; and
(7) that, unless otherwise prohibited by law, the parties may agree to the evidence and waive their right to appear at the hearing.

(c) *Consolidation of notices.* – The notice of hearing may be consolidated with the notice of agency action required under § 10-207 of this subtitle.

(d) *Publication in Register.* – For purposes of this subtitle, publication in the Maryland Register does not constitute reasonable notice to a party.

MD. CODE TAX-GENERAL ARTICLE (TG) §13-703. False Returns.

If, with the intent to evade the payment of tax, a person, including an officer of a corporation, or a governmental unit makes a false tax return, the tax collector shall assess a penalty not exceeding 100% of the underpayment of tax.

TG § 13-705. Frivolous income tax return.

(a) *Penalty.* – The Comptroller shall assess a penalty not exceeding $500 if: (1) an individual, as defined under § 10-101 of this article, files what purports to be an income tax return, but which:

(i) does not contain information on which the substantial correctness of the tax may be determined; or

(ii) contains information that, on its face, indicates the tax reported on the return is substantially incorrect; and

(2) the conduct of the individual is due to:

(i) a desire, apparent on the face of the return, to delay or impede the administration of the provisions of Title 10; or

(ii) a position that is frivolous because the position:

1. has no basis in law or fact;
2. is patently unlawful; and
3. does not involve a legitimate dispute or reflect an inadvertent mathematical or clerical error.

(b) *Additional to other penalty.* — The penalty under subsection (a) of this section is in addition to any penalty assessed under § 13-701 of this subtitle.

TG § 13-1002. Willfully filing false return.

(a) *Alcoholic beverage tax.*- A person who willfully files a false alcoholic beverage tax return is guilty of perjury and, on conviction, is subject to the penalty of perjury.

(b) *Financial institution franchise or income tax.*- A person, including an officer of a corporation, who willfully files a false financial institution franchise tax return, a false public service company franchise tax return, or a false income tax return with the intent to evade the payment of tax due under this article is guilty of perjury and, on conviction, is subject to the penalty for perjury.

(c) *Applicability.*- Subsections (a) and (b) of this section apply to the alcoholic beverage, financial institution franchise, public service company franchise, and income taxes.